Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In The

Supreme Court Of The United States

STEPHEN BURNS KESSLER,
Petitioner,

KEPSFILMS, INC.,
Plaintiff,

vs.

MICHAEL CRICHTON, ANNE MARIE MARTIN,
STEVEN SPIELBERG,
AMBLIN' ENTERTAINMENT, INC.,
WARNER BROS., INC. &
UNIVERSAL STUDIOS, INC.,
Respondents.

On Petition From An Appeal To The Eighth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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8 pp

QUESTIONS PRESENTED FOR REVIEW

1. IS THE COURT OBLIGATED BY LAW TO FIRST DETERMINE OWNERSHIP OF A COPYRIGHT CASE BEFORE IT AS OWNERSHIP IS THRESHOLD RATHER THAN PRINCIPLE IN THE ACTION?

2. DOES AN ACTION ONLY ARISE UNDER THE COPYRIGHT ACT IF AND ONLY IF THE COMPLAINT IS FOR A REMEDY EXPRESSLY GRANTED BY THE ACT?

3. IN ORDER FOR A COURT TO HAVE JURISDICTION OF A CAUSE DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRE THE COURT TO HAVE JURISDICTION OF THE PERSON AS WELL AS THE SUBJECT MATTER?

4. IF THE COURT FAILS TO DETERMINE IN PERSONAM JURISDICTION AND PERMITS A PARTY NOT ALLOWED BY LAW TO GO TO TRIAL CAN THE COURT DISMISS SAID PARTY WITHOUT PERSONAL NOTICE AT TRIAL HOLDING FOR THE JURISDICTIONAL STIPULATIONS OF THE COPYRIGHT LAW?

5. IS THE RIGHTFUL COPYRIGHT HOLDER PREJUDICED IF THE COURT FAILS TO INFORM THE JURY AS FINDERS OF FACT THAT A NON-ACTIONABLE PARTY WAS DISMISSED FOR LACK OF COPYRIGHT OWNERSHIP THEREBY ALLOWING THE JURY TO REACH THEIR VERDICT BELIEVING THE DISMISSED PARTY WAS STILL ACTIONABLE?

6. AFTER SAID DISMISSAL DOES THE COURT STILL HAVE IN PERSONAM JURISDICTION OVER THE DISMISSED PARTY EVEN THOUGH THE PARTY'S CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION AT TRIAL WAS TAKEN AWAY THROUGH DISMISSAL?

7. IF A COURT SUBMITS ITSELF TO THE JURISDICTIONAL MANDATE OF THE COPYRIGHT LAW

THROUGH DISMISSAL AT TRIAL CAN A COURT IN POST-TRIAL CITE CASE LAW CONTRARY TO THE JURISDICTIONAL STIPULATIONS OF THE COPYRIGHT LAW AS AUTHORITY TO ASSUME IN PERSONAM JURISDICTION OVER THE DISMISSED PARTY?

8. CAN A COURT JOIN THE DISMISSED PARTY IN A FINAL POST TRIAL ORDER WITHOUT NOTICE OR MOTION TO, OR OPPOSITION ARGUMENT FROM, SAID JOINED PARTY?

9. CAN A COURT TAX COSTS PURSUANT TO TITLE 28 U.S.C. § 1919 ON A DISMISSED PARTY WHEN, FROM INCEPTION, THE COURT FAILED TO PROPERLY DETERMINE ITS JURISDICTIONAL STATUTORY REQUIREMENTS OF TITLE 28 § U.S.C. 1338 AND ARTICLE III STANDING DOCTRINE?

10. IN A COPYRIGHT CASE IS THE TITLE 28 U.S.C. § 1919 DISMISSAL/TAXATION POSITION IN CONSTITUTIONAL CONFLICT WITH TITLE 28 U.S.C. § 1338 STANDING DOCTRINE?

11. IS A CLIENT RESPONSIBLE FOR ITS ATTORNEYS' ACTIONS IN FEDERAL COURT?

12. DOES AN INTERESTED PARTY HAVE THE RIGHT OF PETITION TO A FEDERAL COURT?

13. IS IT A VIOLATION OF THE FIRST AMENDMENT FOR A COURT TO REFUSE WITHOUT ARGUMENT A PETITION SUBMITTED TO IT BY AN INTERESTED PARTY AS DEFINED BY FEDERAL RULE OF CIVIL PROCEDURE, RULE 24?

14. IS IT PRIOR RESTRAINT AND DENIAL OF RIGHT TO PETITION UNDER THE FIRST AMENDMENT FOR THE COURT TO JOIN AN AMERICAN CITIZEN WITHOUT NOTICE OR MOTION AS CAUSE TO REFUSE A DOCUMENT SUBMITTED TO IT BY SAID CITIZEN?

15. IS IT CONTRARY TO RULE OF LAW FOR OFFICERS OF THE COURT TO USE TRIAL STRATEGY AS AN EXCUSE TO MANUFACTURE EVIDENCE AND TAMPER WITH WITNESSES?

16. IS THE COURT MINISTERIALLY OBLIGATED BY ITS OATH OF OFFICE TO AT LEAST INVESTIGATE CHARGES OF WITNESS AND EVIDENCE TAMPERING IN A CASE BEFORE IT?

17. IS IT DENIAL OF FIFTH AMENDMENT DUE PROCESS FOR THE COURT TO ISSUE JUDGMENT ON A MOTION FOR NEW TRIAL WHICH IGNORES DOCUMENTED EVIDENCE OF PREJUDICE AND FRAUD UPON THE PLAINTIFF AT TRIAL?

18. IS IT DENIAL OF DUE PROCESS FOR A COURT TO ALLOW ATTORNEYS TO WITHDRAW FROM A CASE WITHOUT PREJUDICE AND WITHOUT OPPOSITION ARGUMENT WHEN THEY STAND ACCUSED OF WITNESS AND EVIDENCE TAMPERING IN A FEDERAL CASE?

19. IS IT A VIOLATION IN THE FOURTH AMENDMENT FOR THE COURT TO UPHOLD AN UNCONSTITUTIONAL JUDGMENT ALLOWING SEARCH AND SEIZURE OF PAPERS AND PROPERTY OF AN AMERICAN CITIZEN NOT PROPERLY WITHIN THE COURT'S JURISDICTION?

20. IS JUDGMENT IN A CASE VOID IF JURISDICTIONAL DEFECTS ARE PRESENT FROM INCEPTION, FRAUD IS UPON THE COURT, AND FIRST, FOURTH AND FIFTH AMENDMENT RIGHTS WERE DENIED TO LITIGANT?

21. DO AMERICAN CITIZENS HAVE CONSTITUTIONAL RIGHTS IN A FEDERAL COURT?

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioner Stephen Burns Kessler discloses the following corporate relationship.

KEPSFilms, Inc. is a Missouri corporation in good standing wholly owned by Stephen Burns Kessler.

Respondents Warner Bros., Inc. Universal Studios, Inc. and Amblin' Entertainment, have disclosed the following corporate relationships:

Time Warner Entertainment, Inc. Company, L.P.,
(Respondent Warner Bros., Inc. is a division of this entity)

Time Warner, Inc.
(Hold approximately 75% share of Time Warner Entertainment Company, L.P.)

U.S. West Multimedia Communications, Inc.
(Holds approximately 25% share of Time Warner Entertainment Company, L.P.)

The Seagram Company
(Indirect, ultimate parent company of Universal Studios, Inc.)

Matsushita Electric Industrial Co., Ltd.
(Indirect, ultimate parent company of Universal Studios, Inc.)

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2. On the second day of trial petitioner was dismissed from the case as he was not the rightful copyright holder. Dismissal was effected to maintain subject matter jurisdiction pursuant to Title 17 U.S.C. § 501. 11

   A. Dismissal occurred during a side bar at trial without petitioner's knowledge or consent. Dismissal denied petitioner the substantial right to proceed pro-se pursuant to 28 U.S.C. § 1654 and was done without personal notice. 11

3. The District Court refused petitioner's (post-trial) affidavit stating in a letter from the clerk that all submissions to the court must be submitted through attorneys. 15

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A. The Court cited no authorities, case law or rules in support of its refusal. No substantive legal position was offered. The court erred as affidavit submission was allowed by state law, Federal Rules and the Constitution. 15

4. Sua sponte, the District Court joined petitioner in post-trial in a final order without notice of motion or opposition argument; a procedural due process irregularity contrary to the Fifth Amendment. 19

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A. The Eighth Circuit Courts upheld violation of due process by citing doubt about the meaning of the copyright law as modality for its judgment.

B. Under Title 17 and 28 § 1338 the court's jurisdiction over petitioner was dismissed pursuant to Copyright Law, which the court submitted itself to, and in so doing, the court waived its in personam jurisdiction under *Carlson*. Jurisdiction over petitioner was therefore res judicata 21

5. The appellate court received motion for certification (of constitutional questions) August 11, 2000. It first issued mandate on August 30, rendering timely filed constitutional questions moot; then denied certification to the Attorney General as moot September 25. 24

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PETITION FOR A WRIT OF CERTIORARI

Stephen Burns Kessler respectfully petitions for a writ of certiorari to review the judgments of the Eighth Circuit Court of Appeals which upheld judgments by the United States District Court.

OPINIONS BELOW

The final judgment of the Eighth Circuit Court Of Appeals is unreported and printed in App. 1. The opinions of the Eighth Circuit Court of Appeals are unreported are printed in Appendices 4, 5, 6. Judgments of the District Court are found in Appendices 7, 17, 21 and 22. Complaint, App. 23 with Copyright Forms in Appendices 41 – 44.

JURISDICTION

This case arises under Title 17 of the United States Code. The Eighth Circuit Courts respectively assumed subject matter jurisdiction of this case under 28 U.S.C. section 1338. This petition for certiorari arises out of the appellate court's denial of an appeal on a motion under Fed. R. Civ. P. 60(b)(4).

Supreme Court Jurisdiction: The final judgment to the Eighth Circuit Court Of Appeals was entered on June 26, 2000. An order denying rehearing was entered on August 4, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

Timeliness: On October 24, 2000, Petitioner filed this petition for certiorari within 90 days (less 10 days) of the appellate court's decision on Rehearing. This writ is timely pursuant to Title 28 U.S.C. § 2101 and S. Ct. R. 13.

Supreme Court Rule 29.4(b) Requirement: Pursuant to directives in 28 U.S.C. § 2403 (a) petitioner calls to question the constitutionality of the Acts Of Congress, 17 U.S.C. § 501, (jurisdiction under "The Copyright Act") through rulings by courts defined by 28 U.S.C. § 451 with citation that 28 U.S.C. § 2403(a) may apply with service of this petition to the Solicitor General of the United States. The Appellate Court refused to perform its ministerial obligation to certify existence of said questions pursuant to Fed. R. App. P. 44, an act deserving proper judicial review.

CONSTITUTIONAL PROVISIONS STATUTES & REGULATIONS

Constitution Of The United States of America: Article I separation of powers; and Article III, power invested in the judiciary.

The First Amendment: "Congress shall make no law...abridging the freedom of speech...and the right to petition the Government for redress of grievances." **The Fourth Amendment:** "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." **The Fifth Amendment:** "nor shall any person be subject to the same

offense to be twice put in jeopardy"; "nor be deprived of life, liberty, or property without due process of law."

Titles: 28 U.S.C. § 1338, jurisdiction of the "Copyright Act." **17 U.S.C. § 501**, jurisdiction "Copyright Act," stating in part: Only the holder of the copyright has authority to bring forth suit.

Federal Rules of Appellate Procedure: Rule 44, Cases Involving Constitutional Questions stating: the court is obligated by law to certify existence of Constitutional questions to the Attorney General Of The United States.

STATEMENT OF THE CASE

Between 1989 and 1990, your petitioner, Stephen Burns Kessler, as an employee for hire of KEPSFilms, Inc. wrote a screenplay called "Catch The Wind." Copyright of all screenplay drafts were properly registered with the Library of Congress pursuant to 17 U.S.C. 101 et seq. and were property of KEPSFilms, Inc., App. 41 - 44.

From 1989 to 1993, petitioner and his agent Julian Jablonow, both personally and through the mail, circulated multiple drafts of "Catch The Wind" to numerous production companies in Los Angeles including respondents, Amblin', Universal Studios and Warner Brothers.

In June of 1995, Joel Wayne, senior vice-president of respondent Warner Brothers, made an admission against interest to petitioner's agent Julian Jablonow that respondents illegally and intentionally appropriated petitioner's screenplay to make the film "Twister," written by

Michael Crichton and Anne Marie Martin, executive produced by Steven Spielberg and produced by Amblin, Universal Studios and Warner Brothers.

On June 5, 1996, and after seeing the infringing film "Twister", a copyright infringement complaint was filed in the United States District Court for the Eastern District of Missouri. The complaint was filed on the federal question 28 U.S.C. § 1338 and 17 U.S.C. § 101 et seq. ("The Copyright Act") as it served the basis of Federal Jurisdiction. This action was taken on behalf of "Copyright Owner" KEPSFilms, Inc. and its "employee for hire" Stephen Burns Kessler as plaintiffs and filed against respondents Michael Crichton, Anne Marie Martin, Steven Spielberg, Amblin' Entertainment, Inc., Warner Bros., Inc., and Universal Studios, Inc., App. 23.

Copyright forms were attached to the complaint showing that KEPSFilms, Inc. was the "sole owner" of the copyright to the screenplay "Catch The Wind." No assignments, transfers, or contracts were included with the complaint. Trial commenced in this case on January 7, 1998.

Two days into trial, respondents moved the District Court to dismiss petitioner citing KEPSFilms, Inc. as the "Copyright holder" and the only party allowed by law to bring forth infringement suit. At the start of the third day of trial the District Court dismissed all claims of petitioner leaving KEPSFilms, Inc. as the sole plaintiff and claimant. On January 28, 1998, jury finds for respondents and not plaintiff KEPSFilms, Inc., App. 22.

An officer of KEPSFilms, Inc., Mary Eileen Burke, personally and in fax to plaintiff KEPSFilms, Inc.'s counsel, instructed them to amend preliminary draft of Motion For New Trial to include pertinent new evidence. Against instructions, Counsel refused inclusion of the evidence and filed Motion For New Trial.

On February 13, 1998, petitioner filed "Second Affidavit Of Stephen Burns Kessler" with "Exhibits Supporting Motion For New Trial" in the court pursuant to Fed. R. Civ. P. 5 including service to plaintiff KEPSFilms, Inc. counsel.

The lower Court refused petitioner's "Second Affidavit" and exhibits with a letter from the clerk stating: "all filings must be made through counsel." App. 21.

Citing the petitioner's affidavit as evidence, "Motion to Withdraw" is filed by plaintiff KEPSFilms, Inc. counsels on their own behalf requesting withdrawal under Missouri Supreme Court Rule 4 - 1.16.

On March 19, 1998, in a final order, the Court denies Motion For New Trial and sua sponte joins petitioner as a plaintiff of record with plaintiff KEPSFilms, Inc. without notice or motion or allowing opposition argument. In the same final order the court states jury verdict to be "against plaintiffs" (plural) contrary to the Judgment order of January 28, 1998. The court denies Motion For New Trial; the court denies respondents' request for attorney's fees and court costs; the court grants plaintiff KEPSFilms, Inc. counsel's Motion For Withdrawal under Missouri Supreme Court Rule

4 - 1.16 without allowing opposition argument, citing the affidavit which the court refused into evidence as evidence for said withdrawal. App. 17.

Respondents file "Motion For Reconsideration of Court Costs" citing only one party as plaintiff, KEPSFilms, Inc. Mary Eileen Burke, officer of KEPSFilms, Inc. calls the Honorable E. Richard Webber's office (the presiding judge) asking the clerk if plaintiff KEPSFilms, Inc. should hire an attorney to protect their interests and is told "no" as the Court had already ruled on the question of costs.

The court awards court costs to the respondents holding petitioner as responsible party in the action with plaintiff KEPSFilms, Inc.

Petitioner files a motion for reconsideration calling to question his joinder as plaintiff. The lower Court grants motion then taxes costs against petitioner and plaintiff ignoring the in personam jurisdiction question.

On June 19, 1998, new counsel makes appearance for petitioner and plaintiff KEPSFilms, Inc. Counsel files leave to file motion for reconsideration with motion attachment. The lower Court denies motion for leave to file without ruling on the proffered argument.

Respondents initiate judgment debtor proceedings, which the court orders petitioner to attend. Petitioner exercises Fifth Amendment rights refusing to answer questions and is threatened by respondents with incarceration in a Federal jail if he fails to testify.

At a later hearing, the District Court denied petitioner's Fifth Amendment protection and orders petitioner to submit to the proceedings enabling collection on judgment of $35,973.11. Without waiving argument that the proceedings were in violation of his constitutional rights, petitioner respectfully submits to the court's order.

Petitioner files Motion under 60(b)(4) to the District Court, which is denied. Petitioner files a motion for reconsideration and an amended motion for reconsideration, which is denied. App. 7.

On April 7, 1999, petitioner files appeal and motion to amend case record. On June 26, 2000, the Eighth Circuit Court of Appeals upholds the lower court orders, denies the Appeal and Motion To Amend Record. App. 1.

Petitioner files a Petition For Rehearing, which the Appellate Court denies on August 4, 2000. App. 4. On August 11, 2000, petitioner files Motion For Certification Of Constitutional Questions and Motion For Stay of Mandate. On August 30, the Appellate Court first denies Stay issuing mandate, which renders moot the timely, submitted Constitutional questions. App. 5.

On September 5, 2000, petitioner sends a certified letter to the clerk of the Appellate Court requesting notification of questions to the attorney general pursuant to Federal Rule Of Appellate Procedure, Rule 44. On September 25, 2000, the Appellate court issues an order rendering moot the certification procedure to the Attorney General contrary to its mandate under Rule 44. App. 6.

October 24, 2000, petitioner files Petition For A Writ of Certiorari to the Supreme Court Of The United States.

REASONS FOR CERTIORARI

This case is cert. worthy as the actions and judgments by the United States District Court for the Eastern District of Missouri, Eastern Division has so far departed from the accepted and usual course of judicial proceedings and said departure was upheld by the Eighth Circuit Court Of Appeals which therefore calls for exercise of the Supreme Court's supervisory powers.

The judgment of the Eighth Circuit Court Of Appeals is in "circuit conflict" with the Ninth and Second Circuits.

The modality of judgment of the Eighth Circuit Courts is founded upon "its own doubt" about the jurisdictional meaning of Title 17 U.S.C. § 501, jurisdiction under "The Copyright Act" rendering the Act Of Congress constitutionally questionable.

The judgment of the Eighth Circuit Court Of Appeals in *Kessler v. Crichton* upheld failure in the First, Fourth and Fifth Amendments and its actions were contrary to Article I and Article III of the Constitution of the United States.

Judicial review of the Supreme Court is needed as issues herein continue to provide live controversy that infracts the Preferred Freedoms doctrine and further should not be dismissed as the government action in question is

capable of being repeated; a government action affecting not only rights of copyright litigants but the constitutional rights of every American in a Federal Court of law.

Petitioner was improperly joined by attorneys in the complaint for copyright infringement along with copyright holder, KEPSFilms, Inc. App. 23 Jurisdiction under the Copyright Act holds that only the owner of the copyright has the authority to file suit. See 28 U.S.C. § 1338 and *Eden Toys, Inc. v. Florlee Undergarment, Co.* (1982, CA2 NY) 697 F2d 27, 217 USPQ 201; *Havens v. Time Warner, Inc.* 896 F. Supp 141, 143 (S.D.N.Y.) 1993. See Copyright Forms App. 36 - 39 with KEPSFilms, Inc. as sole claimant.

The District Court failed to determine Article III cases and controversies standing rule, jurisdictional statutes pursuant to 28 U.S.C. § 1338, 17 U.S.C. § 501 and case law therein. The court allowed the action to move forward.

1. **The Eighth Circuit Appellate Court judgment upholds the lower court's actions and doubt about the jurisdictional meaning of the law putting it in "circuit conflict" with both the Ninth and the Second Circuits.** App. 2.

In the Ninth Circuit case *v. Caldeway,* (1983 CA9 Cal) 698 F3d 991, 217 USPQ 715 the court held: "The Court is first required to resolve threshold question of copyright ownership since ownership of copyright is threshold rather than principle question in action." *Topolos* is the representative case under 28 § 1338 in the Lawyers Edition

of the Federal Rules Of Civil and Judicial Procedure and was therefore readily available for the court's proper adjudication of the complaint.

In the Second Circuit case, *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 826 (2d Cir. 1964) the court held: "An action only arises under the Copyright Act if and only if (emphasis added) the complaint is for a remedy expressly granted by the act." (See also *Elan Associates, Ltd. v. Quackenbush Music, Ltd.* (1972, SD NY) 3 9 F Supp 461. 174 USPQ 258. Plaintiff's complaint was not a remedy expressly granted by the act. *See*: App. 23 referenced to App. 41 - 44.

Regarding federal subject matter jurisdiction under 28 § 1338, "a case does not arise under Title 17 merely because the subject matter involves or affects a copyright; the word copyright is not so compelling as to invoke federal jurisdiction upon its mere mention." *Muse v. Mellin*, 212 F.Supp. 315, 316 (S.D.N.Y. 1962)

In *Lopez v. Arraras*, 606 F.2d 347 (1979) the Court held, "we (the courts) are obligated to examine the question of jurisdiction since the question of subject matter is always open for determination. See Fed. R. Civ. P. 12(h)(3); *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) The Eighth Circuit courts failed that obligation.

The Supreme Court held that in order for a court to take jurisdiction of a cause, the Fifth Amendment due process clause requires that it have jurisdiction over the person as well as the subject matter jurisdiction of the cause. *Walker V.*

Walker (1883) 109 US 258, 27 L Ed 927; *Marshall V. Board Of Education* (1978, CA3 NJ) 575 F2d 417

Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed2d 328 (1995) states Article III invested in judiciary to "say what the law is" but conditions the court's political power to uphold separations of powers under Article I stating:

> "It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress' latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must (emphasis added) "decide according to existing laws." Id. at 226-28, 115 S.Ct. at 1457

Congress' latest enactment of Title 17 is clear pursuant to 28 U.S.C. § 1338 and supported by stare decisis: "The Court is first required to resolve threshold question of copyright ownership since ownership of copyright is threshold rather than principle question in action." *Topolos*.

The Supreme Court holds that the standing doctrine has an explicitly "prudential" dimension, developed to keep Article III courts from deciding questions that are more suitable for decisions by politically accountable decision makers thereby maintaining separation of powers under Article I.

Stare decisis applied to 17 U.S.C § 501 and 28 § 1338 unquestionably holds that the Eighth Circuit Courts, under authority of law, did not have proper subject matter jurisdiction in the case before it from inception.

2. On the second day of trial petitioner was dismissed from the case, as he was not the rightful copyright

holder. Dismissal was effected to maintain subject matter jurisdiction under Title 17 § 501.

A. Dismissal occurred during a side bar at trial without petitioner's knowledge or consent. Dismissal denied petitioner the substantial right to proceed pro-se pursuant to 28 U.S.C. § 1654 and was done without personal notice.[1]

The Supreme Court Order of February 28, 1966 in the Rules Of Civil and Judicial Procedure pursuant to Rule 41, the Honorable Mr. Justice Black stated:

> "No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency."

Plaintiff counsel erred bringing petitioner into the case. However, case law argued in judgments by the Appellate Court states "a party submits to the court's jurisdiction through appearance." Therefore, if Court's position be true, dismissal without personal notice violates right of self-representation and Fifth Amendment right of due process.

The Appellate Court held: "there is no constitutional or statutory right to proceed pro se and with benefit of counsel," (App. 3, ¶ 2) that applies to a single litigant. *United States v. Arogofsky*, 20 F.3d 866, 872 (8th. Cir.) Nothing in the rules stipulate that two separate litigants

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[1] The jury was never informed by the court of petitioner's dismissal, reaching their verdict in this case still believing petitioner was actionable.

must be represented by the same counsel. As a corporation plaintiff KEPSFilms, Inc. is obligated by law to have an attorney represent its interest. *See*, e.g., *Iannacone v. Law* 142 F.3d 553, 558 (2nd Cir. 1998); *Pridgin v. Andersen*, 113 F.3d 391, 393 (2nd Cir, 1997). Petitioner as an American citizen is not so obligated. Diversity of legal representation is not mutually exclusive. Consider a litigant's accountability before the court.

Federal Courts hold that an attorney is the agent of his or her client, see generally *Aromatique, Inc. v. Gold Seal*, 28 F.3d 863, 879 (8th Cir. 1994). Therefore a client is responsible for actions by its attorneys/officers of the court.

If officers of the court act contrary to rule of law or interests of a corporate litigant no argument can be put forth as all pleadings to the court must be through counsel as Federal Courts prohibit non-attorneys from representing corporations. See, e.g.: *Iannacone v. Law*; *Pridgin v. Andersen*. The same is not true of a citizen litigant, who can represent themselves under 28 U.S.C. § 1654.

If, at trial, an officer of the court refuses instructions given to them by officers of the corporation or act in a manner inconsistent with corporate interests, there is no trial procedure in place to bring said actions to the court.[2]

KEPSFilms, Inc., is held responsible for the actions of its attorneys, and if those attorneys refuse to follow

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[2] Even if procedure were in place, an American citizen who is a party of interest, or the litigant themselves would not know about its existence as they are not practiced in the law.

instructions of officers of the corporation and instead uphold unlawful acts then under law KEPSFilms, Inc. is accountable. The Honorable Mr. Justice William O. Douglas wrote:

> "The usual argument is that a party to a lawsuit hires his attorney and should therefore be responsible for everything his lawyer does in the case. This may be a good argument in reference to affluent litigants who not only know the best lawyers, but are able to hire them. It is a wholly unrealistic argument, however, to make with reference to individual persons who do not know the ability of various lawyers or who are not financially able to hire those at the top of the bar and who are compelled to rely on the assumption that a lawyer licensed by the state is competent. It seems to me to be an uncivilized practice to punish clients by throwing their cases out of court because of their lawyer's conduct. It may be supportable by good sound, formal logic but I think it has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice." *Order Of February 28, 1966, in the Fed. R. Of Civ. P.*

In closing argument respondents libel petitioner accusing him of purchasing the admission against interest made by Joel Wayne, senior vice-president of respondent Warner Brothers. Respondents' assertions were lies that prejudiced the jury verdict and were availed to respondents through evidence tampering. Jury verdict in this case was for respondents and against KEPSFilms, Inc.

Petitioner and Mary Eileen Burke, officers of plaintiff KEPSFilms, Inc. instructed KEPSFilms, Inc. counsel to

include evidence in plaintiff's Motion for New Trial that proved the petitioner did not purchase said testimony. Plaintiff attorneys refused inclusion and filed the motion.

This caused petitioner to file "Second Affidavit of Stephen Burns Kessler" with attached exhibits for judicial review by the District Court in consideration of plaintiff KEPSFilms, Inc. Motion for New Trial. The affidavit contained a sworn statement under penalty of perjury that a critical piece of evidence and a critical witness were tampered with in this case leading to an unjust verdict. [3]

3. **The District Court refused petitioner's affidavit stating in a letter that all submissions to the court must be submitted through attorneys.** App. 21

   A. **The court cited no authorities, case law or rules in support of its refusal. No substantive legal position was offered. The court erred as affidavit submission was allowed by state law, Federal Rules and the Constitution.**

Missouri law allows an officer of a corporation to petition for review as it "does not arise to the level of active representation or holding out of the corporate employee to the public as capable of performing legal acts." *See: Liberty*

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[3] Though petitioner swears before the Supreme Court that there was evidence and witness tampering in this case, at issue present in Certiorari is not affidavit content, or erroneous factual findings, but the manner in which the District Court departed from the accepted and usual course of judicial proceedings by refusing the affidavit and how said departure was upheld by the Eighth Circuit Court Of Appeals calling for exercise of the High Court's supervisory powers.

Mutual Insurance Co. v. Jones, 344 Mo. 932, 130 S.W. 2d 945 (banc 1939); *Hulce v. Criger*, 247 S.W. 2d at 862.

Federal Law allows a party of interest to petition the court pursuant to Federal Rule Of Civil Procedure. Rule 24(a), "Intervention Of Right" which states: "Upon timely application anyone shall be permitted to intervene to an action..."

Though petitioner's affidavit was not titled a "petition" or "intervention of right" courts have historically held that submissions to a court by persons not practiced in the law should be viewed liberally. See generally: *Holloway v. Corey*, (1979, SD NY) 482 FSupp 551, 2.

A tampered respondents' admission against interest of theft of the screenplay "Catch The Wind" is a most proper argument for the court's consideration of motion for new trial especially in light of jury prejudice.

> "When a motion for new trial is made on the grounds that the verdict is against the weight of the evidence, the court may only grant it when the verdict is against the "clear weight, overwhelming weight, or great weight of evidence." *Mcbyrds v. Carey Lumber Co*, 819 F.2d 185, (8th Cir. 1987); District Court Order March 19, 1998, App. 18, ¶ 4.

The overwhelming weight of the evidence is an admission against interest, which was not purchased as respondents asserted.

For the District Court to refuse ruling on an affidavit, which alleges evidence and witnesses were tampered with

concerning an admission against interest, upholds an unjust jury verdict allowing obstruction of justice to stand.

Due to the incredible power of judicial discretion the court could have properly dealt with the affidavit at its discretion, instead it refused it without authority of law to support its actions usurping its discretion.

By refusing the affidavit without order the District Court exercised prior restraint on evidence contained therein, violating the First Amendment freedom of speech and the right to petition for redress of grievances, an unequivocal act of censorship done without authority of law. *Near v. Minnesota,* 283 U.S. 697 (1931)

In the First Amendment free speech case, *Tinker v. Des Moines,* 393 U.S. 503 (1969), the problem for the High Court was in the area where students in the exercise of First Amendment rights collide with the rules of the school authority.

Application of *Tinker* to this case is appropriate in that citizens do not shed their constitutional right to freedom of speech or expression at the courthouse steps as long as their expression is supported by the rules. In this case Federal Rules of Civil Procedure, Rule 24(a) and Missouri case law uphold a citizen's right to petition under First Amendment right of free speech. The Eighth Circuit Courts denied these rights departing from the accepted and usual course of judicial proceedings calling for an exercise of the Supreme Court's supervisory power.

The words of the Honorable Mr. Justice Hugo Black still ring true, "The freedoms guaranteed by the First Amendment must be accorded to the ideas we hate or later they will be denied to the ideas we cherish." While it may seem repugnant to the court for an interested party to question the actions of attorneys representing a plaintiff in a motion for new trial, the First Amendment guarantees the right to petition as do the rules of civil procedure and Missouri state law.

The court's refusal denied the rightful plaintiff of proper judicial review of evidence for its Motion For New Trial infracting Fifth Amendment due process.

No court has the authority or discretion to uphold an unconstitutional act and allow allegations of witness and evidence tampering to exist unchallenged. To obstruct justice whether intentional or not is usurpation of discretionary power.

The Supreme Court addressed abuse of executive privilege that is "on point" with abuse of discretionary power exhibited by the Eighth Circuit Courts.

In the *United States v. Nixon*, the Court noted President Nixon's use of executive privilege must be considered in "light of our historic commitment to the rule of law profoundly manifest than in our view that:

> "The twofold aim is that guilt shall not escape or innocence suffer. *Berger v. United States*, 295 U.S., at 88. We have elected to employ an adversary system of justice in which all parties contest all issues before a

court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of justice would be defeated if judgments were founded on a partial or speculative presentation of facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts, within the framework of the Rules Of Evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by prosecution or defense." *United States v. Nixon*, 418 U.S. 683 (1974)

The Eighth Circuit Courts denied the compulsory process of evidence through its refusal of the affidavit without order, which would have allowed proper argument on the issues. The ends of justice were defeated in this case as the Eighth Circuit Court judgments were based upon partial and speculative presentations of facts leaving us only with assumptions and innuendo to comprehend its actions.

Some may argue that judicially imposed restraints are less serious than administrative restraint, that freedom of expression is better served by the use of prior restraint than by severely punishing expression after the fact.

In this case prior restraint was used as was punishing expression after the fact.

4. Sua sponte, the District Court joined petitioner in post trial in a final order without notice of motion or opposition argument; a procedural due process irregularity contrary to the Fifth Amendment. App. 17

A. The Eighth Circuit Courts upheld violation of due process by citing doubt about the meaning of the copyright law as modality for its judgment.

"While the Court agrees that section 501 (b) does provide that only the copyright holder has the right to bring a copyright infringement action, the Court is also aware that section 501 does not indicate when a Court will or will not have jurisdiction. Similarly, Section 501 does not indicate when a party who brings a copyright action, but is later found not to be the copyright holder after much discovery in a case, should be liable for costs. Therefore, it is clear that section 501 does not provide all the answer raised by plaintiff Kessler's repeated attacks upon the costs taxed against him. First, section 501 does not provide any insight into the situations in which a Court has jurisdiction over a party. Section 501 does provide that the holder of the copyright may bring a lawsuit as the proper plaintiff, but it does not indicate whether the Court has jurisdiction over an individual who brings a lawsuit notwithstanding his or her lack of ownership over the copyright. Therefore, the Court must look elsewhere determining whether it had jurisdiction over plaintiff Kessler." District Court Order of March 16, 1999, App. 9 ¶ 3, 10 ¶4. [4 & 5]

The Supreme Court clarified importance of due process:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections... and it must afford a reasonable time for those interested to make their appearance." *Mullans v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) id at 314-15, 70 S.Ct. at 657.

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[4] The Honorable E. Richard Webber, Judge Presiding for the Eighth District Court.

[5] The court ignores dismissal of Petitioner at trial was res judicata as it submitted itself to Title 17 statutory jurisdiction.

The Supreme Court holds that a court cannot, consistent with due process, set aside judgment of dismissal and render a personal judgment against litigant without notice. *Wetmore v. Karrick*, 205 U.S. 141, 27 S.Ct. 434, 51 L.Ed. 745 (1907)

The District Court, sua sponte, joined Petitioner in a post-trial final order, without notice, motion or opposition argument. The authority of law on said joinder is clear: the interest of justice requires persons to be given notice of action, which may affect their interests. See: *Boles v. Greensville Housing Authority* (1972, CA6 Tenn) 468 F2d 476, 16 FR Serv 2d 821; *Gentry v. Smith* (1973, CA5 Fla)487 F2d 571, 18 FR Serv 2d 221; *Donovan v. Painters, Decorators, etc.* (1982, DC Mass) 540 F Supp 305, 111 BNA LRRM 2229, 96 CCH LC ¶ 14097, 34 FR Serv 2d 1073.

The Appellate and District Courts ignored petitioner's jurisdictional and constitutional facts without comment citing instead *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1163 (8th Cir. 1999) holding that "a party consents to the District Court's jurisdiction through appearance." Appellate Order, June 26, 2000. App. 2, ¶ 2.

B. Under Title 17 and 28 § 1338 the court's jurisdiction over petitioner was dismissed pursuant to Copyright Law, which the court submitted itself to, and in so doing, the court waived its in personam jurisdiction under *Carlson*. Jurisdiction over petitioner was therefore res judicata. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931)

Plea of "res judicata" asserts that former judgment bars the post-trial joining of petitioner in the action. *Hartmann v. Time, Inc. C.C.A.Pa.*, 166 F.2d 127, 128.

Res judicata is not a mere matter of practice or procedure, but is a rule of fundamental and substantial justice designed to secure an end to litigation. *Wilson v. US.*, C.C.A.Mo., 166 F.2d. 527, 529. Further, Fed. R. Civ. P. Rule 41(a)(1) provides dismissal of a plaintiff in an action operates as adjudication on the merits.

Pursuant to Fed. R. Civ. P. 19(a), the court could not join the petitioner in post-trial as said joinder would deprive the court of subject matter jurisdiction pursuant to 17 U.S.C. 101 et seq., "The Copyright Act."

The court itself invoked jurisdiction over petitioner and prior restraint over petitioner's affidavit is the only rational explanation to support its actions. *Helm v. Zarecor*, (1911) 222 U.S. 32, 56 L. Ed. 77, S Ct 10.

Further, the moment the court invoked jurisdiction over petitioner it gave up its jurisdiction of subject matter. 28 U.S.C. § 1359 states: "District Court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of the court."

Petitioner's in personam jurisdiction is wrought with confusion. Arguments made by respondents and the Courts confuse due process issues; muddy jurisdictional waters; uphold unconstitutional actions and serve to frustrate a fair and impartial judicial review.

To try to rectify errors on the record petitioner filed a Motion To Amend record, which the Appellate Court denied in its final judgment upholding error. Never the less the old debate axiom if you can't win the issue confuse it is appropriate to arguments put forth by the Eighth Circuit Courts and respondents.[6]

The Appellate Court's judgment upheld doubt about the jurisdictional meaning of the copyright law. Constitutional issues were presented to the Appellate Court at start of Appellant's brief "Were constitutional rights violated through improper adjudication?"

Petitioner again brought constitutionality to the Appellate Court's attention in his Reply Brief of August 9, 1999 at 11, 12, 14, 15, and 17; again preserved question in Petition For Rehearing of July 10, 2000, at 7, 8, 9, 11, 13, 14.

The question was called and ignored by the Appellate Court Judgment of June 26 and August 4, triggering a formal

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[6] The following assertions are erroneous under authority of law and facts of the case.

After petitioner argued with the District Court over two years through multiple pleadings the court finally clarified one confused truth stating: "While plaintiff Kessler is correct in noting that the Court incorrectly stated that the judgment was against plaintiffs..." Dist. Court Order Denying Mot. 60(b)(4), App. 9, see footnote.

Despite that, in Appeal Brief Respondents claim "After jury verdict was rendered against co-plaintiff KEPSFilms, Inc...." Respondents' assertion is wrong. (See: Judgment Order, App. 22)

"Kessler attempted to file an affidavit in support of co-plaintiff KEPSFilms, Inc. Motion for New Trial." (Appellee Br. at 8) Wrong. Petitioner was no longer co-plaintiff or actionable at Mot.for New Trial.

Motion For Certification Of Constitutional Questions submitted to the court on August 11, 2000. Under Federal Rules Of Appellate Procedure, Rule 44, upon receipt of certification of questions the court was minister ally obligated to certify existence of said questions to the Attorney General.

5. **The Appellate Court received motion for certification August 11, 2000. It first issued mandate on August 30, 2000,** App. 5, **rendering timely filed constitutional questions moot; then denied certification to the Attorney General as moot September 25.** App. 6.

The Appellate Court's judgment hinges on the belief that the court had proper jurisdiction over petitioner in post-trial. As this argument has proven under authority of law that is simply not true. The judgment of the Court of Appeals is not only in "circuit conflict" with the Ninth and

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[6] (con't) "Kessler and KEPSFilms, Inc., through counsel, filed an opposition to attorneys fees. No objection was filed to bill of costs." (Appellees Br. at 9) Argument was made solely on behalf of KEPSFilms, Inc. and objection to bill of costs were put forth.

"The court found that the plaintiff had not filed a timely opposition to bill of costs and thus was required to tax costs." (Appellee Br. at 6) The court denied both attorney fees and costs in its order of March 19, 1998 (App. 20, ¶ 5) as taxation of costs was properly argued.

Respondents claimed petitioner fired KEPSFilms, Inc. attorneys. (Appellee Br. at 8) False.

Allegation restated by respondents, "Kessler's attorneys withdrew after he terminated their representation." (Appellee Br. at 12) There is no proof to this assertion as it did not happen. Further, attorneys were representing KEPSFilms, Inc. not your petitioner.

Second Circuits but it is based upon its own doubt about the meaning of the law and further violates the First, Fourth and Fifth Amendments. App. 3, 4, ref. to App. 9 ¶ 3, 10, ¶ 4.

The Eighth Circuit Courts ignored the statutory jurisdictional stipulations of the Copyright law and its Article III responsibilities in pre-trial; upheld the copyright statute through dismissal at trial to maintain copyright action; then ignored the copyright statute through a post-

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[6] (con't) The District Court states "Plaintiff indicated he had fired his attorneys." (Memorandum and Order March 19, 1998, App. 20, ¶ 8) Said indication is assumptive by the court and not true.

"Kessler is not an attorney and had no right to submit an affidavit on behalf of corporate party." (Appellee Br. at 12 and 15) Ignores Missouri and Federal law regarding petition as argued.

"Kessler was served with his attorneys' motion (to withdraw) but did not pose any objections to the District Court. Due process requires nothing more." (Appellee Br. at 6) Respondents cannot hold petitioner responsible for not responding when the District Court denied him of that right asserting all pleadings must be through attorneys. (App. 21)

The District Court cites confusion and doubt over the jurisdictional stipulations of the Copyright Law as modality to deny due process.

The Eighth Circuit Courts argue that the thrust of the Motion under 60(b)(4) was over "taxation of costs." App. 2, ¶ 2; 7 ¶ 1 . Wrong. The issue is denial of due process through jurisdictional failure, which renders costs in this case as unconstitutional and therefore moot.

The District Court held: "and plaintiff Kessler has not put forth any reasons requiring the court to reverse that outcome [jury verdict]. App. 8 footnote 1, ¶ 2. Reasons were put forth in the affidavit that the Court refused without ruling on the evidence.

trial joinder violating Article III cases and controversies standing doctrine which deprived the court of its subject matter jurisdiction as a party not allowed by statute was joined in the case.

Judgment in this case is void under 60(b)(4), subject of the appeal, as the court lacked jurisdiction of the subject matter and the parties and due process violations have clearly occurred. See: *Mullans v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) id at 314-15, 70 S.Ct. at 657; *Kansas City S.R. Co. v. Great Lakes Carbon Corp.* (1980, CA8 Mo) 624 F2d 822, 59 ALR Fed 816, cert. den. 449 US 955, 66 L Ed 2d 220, 101 S Ct 363; *Covington Industries, Inc. v. Resintex A.G.* (1980, CA2 NY) 629 F2d 730; *Kocher v. Dow Chemical Co.*, 132 F.2d 1225, 1229, 1231 (CA8, 1997). Taxing costs pursuant to 28 U.S.C. § 1919 is not "just" as in addition to due process irregularities 1919 is in constitutional conflict with 28 U.S.C. § 1338 standing doctrine. (see: Question For Review, #10: In a copyright case is the Title 28 U.S.C. § 1919 dismissal/taxation position in constitutional conflict with Title 28 U.S.C. § 1338 standing doctrine?)

Petitioner objectively states that it is in the best interest of justice to allow proper judicial review of this case by the Supreme Court of the United States. The Eighth Circuit Court's refusal of the affidavit violates the Preferred Freedoms Doctrine as it slams shut the door on an American's right to petition the court.

If allowed to stand the Appellate Court's judgment obstructs justice concerning tampering with respondent's admission against interest.

The admission was never denied at trial or in deposition and stands as proof that KEPSFilms' screenplay was illegally appropriated. The evidence far outweighs the jury verdict. But the District Court refused to admit the affidavit into evidence even though the court cited the affidavit as evidence to allow Plaintiff attorneys to withdraw. App. 19, ¶ 8.

The Eighth Circuit Courts have denied the jurisdictional requirements of law under Article III, Title 17 and Title 28 U.S.C. § 1338; denied amending errors in the record; denied the jurisdictional facts of this case; denied presentation of evidence in this case in violation of the First Amendment; denied petitioner's constitutional questions by rendering them moot contrary to Federal Rule Of Appellate Procedure, Rule 44 and Title 28 U.S.C. § 2403(a); denied fundamental Fifth Amendment rights of due process to the rightful litigant; and denied the First, Fourth and Fifth Amendment constitutional rights of an American citizen in a Federal Court.

What the courts have upheld defies legal reason and the principles of liberty; a clearly unconstitutional judgment to enforce debtor proceedings allowing illegal search and seizure of petitioner's effects and papers. The question is:

If the Supreme Court does not employ its discretionary supervisory power of judicial review and issue certiorari to reverse this conduct, then when will it ever reverse?

There are thousands of artists in America who seek the protection of the copyright law and who now look to the Supreme Court to define their jurisdictional rights under that law. They are not wealthy or politically influential, but they embody the creative spirit that is uniquely American. Like Petitioner, most of these artists could not even afford to protect their intellectual property if infringed, but at one time neither could individual respondents. Yet in these authors, playwrights, composers, screenwriters, poets and directors rests the future of this country as they represent freedom of thought. Please, protect that freedom so denied in this case.

The Supreme Court could refuse to employ its discretionary power and deny certification in this case which would have tragic consequences as it would enable confusion of the law and denial of right to petition to go unchallenged.

Denial would allow a government action capable of being repeated to be repeated. Failure to certify would affect not only the rights of litigants in a copyright case but also the rights of every American in a Federal Court of Law.

This Most Honorable and Esteemed Court should clarify the rule of law and define application of federal rules to Title 17 pursuant to Fed. R. Civ. P. 81(a). And further delineate to the lower courts an American citizen's right to petition a Federal Court pursuant to Fed. R. Civ. P. 24(a) and the First Amendment of the Constitution.

CONCLUSION

THEREFORE, Petitioner moves the Honorable Justices of the Supreme Court to employ your discretionary powers of judicial review and issue certiorari in this case; clarify the meaning of jurisdiction under the copyright law; and define American citizens' constitutional rights to petition in a Federal Court of Law. Petitioner prays the Esteemed and Honorable Justices hold for the rights of all Americans and employ its power of judicial review over this important precedent case and these most important questions.

Respectfully Submitted,

STEPHEN BURNS KESSLER
Petitioner
639 West Rose Hill
Kirkwood, Missouri 63122
314-966-0214

Petitioner, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

In Re: KEPSFILMS, INC.: Petitioner

Petition For Review To Honorable Justices of The United States Supreme Court

To the Honorable Justices of the Supreme Court of the United States. Petitioner KEPSFilms, Inc.:

¶ 1. Stephen Burns Kessler is an officer of your Petitioner, KEPSFilms, Inc. (a Missouri Corporation in good standing). Missouri law does not allow a corporate officer to represent their corporation in legal proceedings Clark v. Austin, 101 S.W.2d at 982-83. Missouri law does allow an officer of a corporation to petition for review as it "does not arise to the level of active representation or the holding out of the corporate employee to the public as capable of performing legal acts." *See* Liberty Mutual Insurance Co. v. Iones, 344 Mo. 932, 130 S.W. 2d 945 (enbanc 1939); Hulse v. Criger, 247 S.W. 2d at 862.

¶ 2. On October 24, 2000, a "Petition For Writ Of Certiorari" was filed before this esteemed Supreme Court, by petitioner Stephen Burns Kessler in the above referenced case number under his name as sole petitioner without case title reference to your petitioner, KEPSFilms, Inc.

THEREFORE, Petitioner KEPSFilms, Inc. petitions the Supreme Court to review Stephen Burns Kessler's pleadings and arguments in a light favorable to Petitioners legal standing as a rightful petitioner in the above action.

Respectfully Submitted
Stephen Burns Kessler,
Officer for Plaintiff, KEPSFilms, Inc.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1994EMSL

STEPHEN B. KESSLER
Appellant

KEPSFILMS, INC.
Plaintiff

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Appellees

Appeal From the United States District Court
for the Eastern District of Missouri.

BEFORE WOLLMAN, CHIEF JUDGE, AND MCMILLIAN AND HANSEN, CIRCUIT JUDGES.

[UNPUBLISHED]

Submitted: June 19, 2000

Filed: June 26, 2000

PER CURIAM

¶ 1. Stephen B. Kessler appeals from final orders in the United States District Court[1] for the Eastern District of Missouri, denying his Fed. R. Civ. P. 60(b)(4) post-judgment motion relating to the taxation of costs against him personally following an adverse jury verdict in his copyright infringement action. For reversal, Kessler contends that the District Court lacked personal jurisdiction over him and denied him due process. He also argues that the court erred in not considering the pro se affidavits he submitted prior to his attorney's withdrawal and in not permitting him to argue against his attorney' motion to withdraw. We deny Kessler's motion to supplement the record and, for the following reasons, we affirm the judgment of the District Court.

¶ 2. A judgment is void if the rendering court lacked jurisdiction or acted in a manner inconsistent with due process. *See Chambers v. Armontrout*, 16 F.3d 257, 260 (8th Cir. 1994). We conclude the judgment here is not void. First, the District Court has personal jurisdiction over Kessler by virtue of his filing the infringement action and voluntarily appearing at trial, see *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1163 (8th Cir. 1999) (individual may submit to district court's jurisdiction by appearance), and Kessler's subsequent dismissal did not deprive the court of its jurisdiction to order him to pay costs, cf. 28 U.S.C. § 1919 (district court may order payment of "just costs" when

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[1] The Honorable E. Richard Webber, United States District Court for the Eastern District of Missouri.

action or suit is dismissed). Second, Kessler was not deprived of due process when his pro se submissions were rejected and his attorney's were permitted to withdraw. *See Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (pro se litigant has not statutory or constitutional right to have counsel appointed in civil case); *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994) (decision to allow counsel to withdraw is left to district court's discretion; *United States v. Arogofsky*, 20 F.3d 866, 872 (8th Cir.) (There is no constitutional or statutory right to simultaneously proceed pro se and with benefit of counsel.") cert. denied, 513 U.S. 909 (1994).

Accordingly we affirm,

A true copy.

Attest

Clerk U.S. Court Of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1994EMSL

STEPHEN B. KESSLER
Appellant

KEPSFILMS, INC.
Plaintiff

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Appellees

Appeal From the United States District Court
for the Eastern District of Missouri.

Order Denying Petition for Rehearing and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1994EMSL

STEPHEN B. KESSLER
Appellant

KEPSFILMS, INC.
Plaintiff

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN
AMBLIN' ENTERTAINMENT, INC., STEVEN
SPIELBERG, WARNER BROS. INC.,
UNIVERSAL CITY STUDIOS, INC.
CONSTANT C PRODUCTIONS, INC.
Appellees

Appeal From the United States District Court
for the Eastern District of Missouri.

BEFORE WOLLMAN, CHIEF JUDGE, AND MCMILLIAN AND HANSEN, CIRCUIT JUDGES.

Appellant's motion to stay the mandate in this matter has been considered to be timely filed. The motion to stay is denied.

The mandate now being considered as having been entered, appellant's motion for certification of constitutional questions is also denied.

August 30, 2000
Order Entered at the Direction of the Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1994EMSL

STEPHEN B. KESSLER
Appellant

KEPSFILMS, INC.
Plaintiff
v.
MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Appellees

Appeal From the United States District Court
for the Eastern District of Missouri.

BEFORE WOLLMAN, CHIEF JUDGE, AND MCMILLIAN AND HANSEN, CIRCUIT JUDGES.

Appellant Kessler's request regarding certification to the Attorney General of the United States is denied as moot.

September 25, 2000

Order Entered at the Direction of the Court

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION CASE NO. 4:96CV01125 ERW

FILED MARCH 16, 1999.

STEPHEN B. KESSLER, KEPSFILMS, INC.
Plaintiffs

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Defendants

MEMORANDUM AND ORDER

¶ 1. This matter before the Court upon a number of pending motions. These motions appear to be or concern the latest in a series of attacks by plaintiff Stephen Burns Kessler upon the costs taxed against him in this matter. The matters currently pending in this case are as follows: (1) plaintiff Kessler's Motion for Stay of Judgment [Document #265]; (2) plaintiff Kessler's Motion to File Preservation of Certain Defenses Supporting Amended Motion to Dismiss & Remainder to Independent Action [Document #266]; (3) plaintiff Kessler's Motion to Vacate; Judgment is Void under 60 (b) (4) [Document # 267]; (4) defendants Motion For Appropriate Relief and for Additional Time to Respond to Plaintiff's Motions of January 28, 1999 [Document #271];

and (5) plaintiff Kessler's Motion for Reconsideration of Amended Motion [Document #272].

¶ 2. For the most part, all of these motions concern the taxing of costs against plaintiff Kessler in favor of defendants in this action.[1] While the Court believes that it has not only acted properly, but acted as directed by the applicable statutes and case law, the Court has not directly addressed the various claims raised by plaintiff Kessler in recent months regarding his belief that the Court has no authority or jurisdiction to tax costs against him. Because

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[1] At times plaintiff Kessler also appears to attack the judgment entered in this case against KEPSFilms, Inc. in January of 1998. As this Court recently noted in its Memorandum and Order denying plaintiff Kessler's Motion for Dismissal & Remander to Independent Action [Document #270], the judgment against plaintiff KEPSFilms, Inc. was entered more than thirty days before plaintiff Kessler filed his Motion For Dismissal & Remander to Independent Action. Because Federal Rule Of Civil Procedure 60(b) is not a substitute for a timely appeal and the time limit for appealing the judgment entered against plaintiff KEPSFilms, Inc. has passed, see Federal Rule Of Appellate Procedure 4 (a) (1), plaintiff Kessler may not attack judgment through Federal Rule Of Civil Procedure 60 (b). See Document #270 and discussion therein. More than a year has passed since the jury entered its verdict in favor of defendants. Plaintiff Kessler even filed a Motion For A New Trial [Document #202] which was denied by the Court. For these reasons, the Court still believes that the judgment entered in this case in January of 1998 following a trial by jury should stand. The Court believes the evidence was more than sufficient to support the jury's finding, and plaintiff Kessler has not put forth any reason requiring the Court to reverse that outcome. As a result, it is too late, at this time, to attack the judgment in this case.

Because the Court believes that plaintiff Kessler is still trying to litigate the case that was tried to the jury, the Court cited the date of the

plaintiff Kessler has demonstrated his lack of understanding for the taxing of costs against him and believes that the Court is taking unjust actions against him, the Court believes that the interest of justice require the Court to explain why the taxing of costs in this case is appropriate. Plaintiff Kessler has announced that "if the Court can properly ascertain through the rules and cite under case law that its actions are proper and within Constitutional constraints and not in violation of due process then Plaintiff will, in good faith, submit to the orders of the Court." See Document #277, p. 5. The Court concludes that the prior order in this case assessing costs is appropriate.

¶ 3. The heart of plaintiff Kessler's attack upon the taxing of costs against him in this matter is 17 U.S.C. § 501 (b). That provision provides that only the holder of a copyright has the right to bring a copyright infringement action. While the Court agrees that section 501 (b) does provide that only the copyright holder can bring a copyright infringement action, the Court is also aware that section 501

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1 (con't) judgment in its Memorandum and Order of January 28, 1999 for the purposes of indicating to the parties the great length of time that has expired in this case since the judgment. While plaintiff Kessler is correct in noting that the Court incorrectly stated that the judgment against plaintiffs, as opposed to plaintiff, the error does not have any impact upon the Court's decision to not hear any further attacks upon the judgment entered in this case following a trial by jury. The Court cited the date of the judgment for the purposes of indicating that the judgment has been entered for a long period of time, not for any purposes related to the taxation of costs against plaintiff Kessler or otherwise.

does not indicate when a Court will or will not have jurisdiction. Similarly, Section 501 does not indicate when a party who brings a copyright action, but is later found not to be the copyright holder after much discovery in a case, should be liable for costs. Therefore, it is clear that section 501 does not provide all the answers raised by plaintiff Kessler's repeated attacks upon the costs taxed against him.

¶ 4. First, section 501 does not provide any insight into the situations in which a Court has jurisdiction over a party. Section 501 does provide that the holder of the copyright may bring a lawsuit as the proper plaintiff, but it does not indicate whether the Court has jurisdiction over an individual who brings a lawsuit notwithstanding his or her lack of ownership over the copyright. Therefore, the Court must look elsewhere determining whether it had jurisdiction over plaintiff Kessler.

¶ 5. The fact is not disputed in this case is that plaintiff Kessler was at one time a plaintiff in this matter along with KEPSFilms, Inc. See Complaint, Document #1.[2] This case is still the same case, 4:96CV01125ERW. As defendants have noted, plaintiff Kessler's appearance in this case through a lengthy discovery process until the early stages of trial is sufficient to provide the Court with in personam jurisdiction over him. See generally *Carlson v.*

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[2] Plaintiff Kessler argues that he was improperly joined as a plaintiff by "attorney error;" however, this argument ignores the fact that "an attorney is an agent of his or her client." See generally *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 879 (8th Cir. 1994).

Hyundai Motor Co., 164 F.3d 1160, 1163 (8th Cir. 1999) (noting the party "consented to the district court's jurisdiction by voluntarily appearing") Plaintiff Kessler wants the Court to believe it had no jurisdiction over him after he used this very forum during the discovery process and up until the early stages of trial to advance his cause against defendants.[3] The Court ruled pre-trial motions while plaintiff Kessler sought recovery against defendants.

¶ 6. In addition to having in personam jurisdiction over plaintiff Kessler, the Court also has subject matter jurisdiction over through 28 U.S.C. § 1338, because the cause of action was based upon the copyright law. Because the Court has subject matter jurisdiction over the copyright action of both plaintiff Kessler and KEPSFilms, it is clear that 28 U.S.C. § 1359 simply does not apply to this case. As the Court stated in the memorandum and order entered on January 28, 1999, no party has alleged in this case that a party was "improperly or collusively made or joined to invoke the jurisdiction" of this Court. 28 U.S.C. § 1359 (emphasis added). The Court clearly has jurisdiction over copyright actions, and no argument is made that this Court

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[3] In addition, the Court notes that another statutory provision, 29 U.S.C. § 1919 provides that a Court "may order the payment of just costs" even when an action is dismissed for want of jurisdiction." This provision granted the Court the authority to tax costs against plaintiff Kessler even if the Court was required to dismiss his cause of action on the ground that the Court did not have jurisdiction over him. In reviewing this statute, the Seventh Circuit has stated that through the statute, the "District Court has power to tax costs even though it has no jurisdiction to entertain an action." *Mashak v. Hacker*, 303 F.2d 526 (7th Cir. 1962)

does not have jurisdiction over KEPSFilms. Thus, no party was improperly or collusively joined in this case for the sole purpose of securing jurisdiction, because the Court clearly has jurisdiction over actions brought under the copyright act. It was plaintiff who filed this action in his name. Therefore, section 1359 simply is not applicable in this case.[4]

¶ 7. Therefore, the Court believes that these facts clearly establish the Court's jurisdiction over plaintiff Kessler. Plaintiff Kessler not only initiated this lawsuit in this forum in his name, but also took part in discovery. In addition, his cause of action remained before the Court until the early stages of trial. At that point, his case was dismissed, but not until defendants expended substantial costs in litigating the claims brought against them by KEPSFilms, In. as well as plaintiff.

¶ 8. Because the Court finds that it had, and still has, jurisdiction over plaintiff Kessler for the reasons set forth supra, the Court must decide whether the dismissal of plaintiff Kessler during the early stages of trial prohibits the Court from taxing costs against him. Federal Rule Of Civil Procedure 54 (d) provides that costs "shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." (emphasis added); see also *Blake v. J.C. Penney Co., In.* 894 F.2d 274, 281 (8th Cir. 1990) (noting that a district court may award costs "as a matter of course."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352

[4] The purpose of section 1359 is to "prevent agreements or transactions the primary aim of which is to manufacture federal subject

(1981) (recognition that taxation of costs is "normal incident of defeat.") The defendants in this case were prevailing parties even if, as plaintiff Kessler argues, plaintiff Kessler's claim was "voluntarily" dismissed at trial without prejudice. *Anderson v. Christian Hospital Northeast-Northwest*, 100 F.R.D. 497, 496 (E.D. Mo. 1984) (noting in taxing costs against plaintiffs dismissed on the eve of trial for failure to comply with discovery orders that defendants were "prevailing parties," even though plaintiffs' claims were dismissed without prejudice and not on the merits) (citations omitted); see also *Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997) (voluntary dismissal of claims sufficient to make defendants prevailing parties for the purposes of awarding costs, and district court may not deny such costs to defendants even if litigant brought claims "in good faith and without vexatious purposes") *Sheets v. Yamaha Motors, Corp.*, 891 F.2d 533, 539 (5th Cir. 1990).

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[4] (con't) matter jurisdiction." Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3637 (1998) (citing, inter alia, *Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990) for the following propositions: (1) that section 1359 is "designed to prevent the litigation of claims in federal court by suitors who by sham, pretense, or other action acquire a spurious status that would allow them to invoke the limited jurisdiction of the federal courts;" and (2) that the purpose of section 1359 "is to prevent the manipulation of jurisdiction facts where none existed before - for example, through collusive assignments from a non-diverse party to adverse party"). This Court clearly had subject matter jurisdiction; therefore, no party took actions for the purposes of manufacturing federal jurisdiction in violation of section 1359.

¶ 9. For these reasons, the Court acted appropriately in taxing costs against plaintiff Kessler. While the Court understands that plaintiff Kessler opposes the taxing of costs on the ground that the defendants have more resources than him and do not need the costs, the Court must follow the rule of law in each case regardless of the relative wealth of the parties involved. See *Kern v. TXO Productions Corp.*, 738 F.2d 968, 972, (8th Cir. 1984) (noting that the "fact that a party is a corporation, or is thought to be rich, or both, is and must be irrelevant in courts of justice") see also *Thomas v. First Federal Savs. Bank of Indiana*, 659 F. Supp. 421, 425 (D. Ind. 1987) (rejecting plaintiffs' argument that it would be inequitable and result in the chilling of private actions to enforce federal laws if the district court imposed costs against individuals in favor of large corporations); *American Key Corp. v. Cumberland Assocs.*, 102 F.R.D. 496, 498 (D. Ga. 1984) (taxing costs against plaintiffs despite fact that plaintiffs had limited financial resources and defendants had great financial resources, because the defendants incurred large expenses, most of which were not recoverable, before prevailing on summary judgment after much discovery was completed). The defendants' reasons for attempting to secure their costs against plaintiff Kessler are irrelevant to this Court. This Court must follow the rules of law as set forth by statute and precedent. In this case, the Court clearly had the authority to tax costs against plaintiff Kessler upon request by defendants. The Court believes that a failure to tax such costs in this case would be an abuse of discretion, because

defendants incurred substantial costs in litigating these claims against KEPSFilms to a verdict and against plaintiff Kessler until the early stages of trial. See *Kern*, 738 F.2d at 972 (finding that taxing of costs to be "almost always" appropriate in "cases where dismissal is allowed after the trial has begun").

¶ 10. Moreover, if the Court did not tax costs against plaintiff Kessler, the Court's decision would allow plaintiffs who discover that their cases will fail just prior to the entry of a verdict could dismiss their actions in order to avoid taxing of costs, even though the defendants defending against such actions may incur substantial costs in litigating the claims against them. The Court believes that such a decision would run contrary to the statutes authorizing the taxing of costs in favor of prevailing parties. For these reasons, the Court finds that it had authority to tax costs against plaintiff Kessler and acted appropriately in taxing costs against plaintiff Kessler under the facts of this case.

Accordingly,

IT IS HEREBY ORDERED that plaintiff Stephen Burns Kessler's Motion for Stay of Judgment [Document #265] is DENIED.

IT IS FURTHER ORDERED that plaintiff Kessler's Motion To File Preservation of Certain Defenses Supporting Amended Motion to Dismiss and Remander To Independent Action [Document #266] is DENIED.

IT IS FURTHER ORDERED that plaintiff Kessler's Motion to Vacate: Judgment is Void under 60 (b) (4) is DENIED.

IT IS FURTHER ORDERED that plaintiff Kessler's Motion For Reconsideration of Amended Motion [Document # 272] is DENIED.

IT IS FURTHER ORDERED that defendants' Motion For Appropriate Relief and for Additional Time to Respond to Plaintiff's Motions of January 28, 1999 [Document #271] is GRANTED to the extent that defendants seek relief from filing motions in opposition to plaintiff Kessler's motions attacking the judgment or costs taxed against him.

Dated this 16th day of March, 1999.

/s/ E. Richard Webber

E. Richard Webber
United States District Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
CASE NO. 4:96CV01125 ERW

FILED MARCH 19, 1998.

STEPHEN B. KESSLER,
KEPSFILMS, INC.
Plaintiffs

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Defendants

MEMORANDUM AND ORDER

¶ 1. This matter is before the Court on plaintiffs' motion for new trial [Document #202], motion to withdraw as counsel to plaintiffs [Document #203], defendants' motion for attorneys fees [Document #0] and defendants' bill of costs [document #0].

¶ 2. This case was tried in front of a jury from January 7 through January 28, 1998. On January 28, 1998, the jury returned a verdict for defendants and against plaintiffs on all counts. Plaintiffs then filed a timely motion for new trial pursuant to Federal Rule of Civil Procedure 59.

¶ 3. It is almost entirely within the discretion of the trial court whether to grant a new trial. Fed. R. Civ. P. 59(a); *Citizens Bank of Nateville, Arkansas v. Ford Motor Co.* 16 F.3d 965, 967 (8th Cir. 1994). In reviewing a motion for new trial

on the ground that the jury's verdict is against the weight of the evidence, the Court is free to weigh the evidence for itself. *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992). A court may grant a new trial on the basis that the verdict is against the weight of the evidence, if the first trial results in a miscarriage of justice. *Butler v. French*, 83 F.3d at 942, 944 (8th Cir. 1996); *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir. 1995) *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir, 1994).

¶ 4. When a motion for a new trial is made on the ground that the verdict is against the weight of the evidence, the court may only grant it when the verdict is against the "clear weight, overwhelming weight, or great weight of the evidence," *Mcbyrde v. Carey Lumber Co.*, 819 F.2d 185, 189 (8th Cir. 1987). The Eighth Circuit, in discussing the standards for a motion for a new trial has stated

> the district court, while possessing discretion to set aside a jury verdict and grant a new trial, may not do so merely because it believes that the evidence permitted different inferences or that another result would be more reasonable....Rather, the court must conclude that the jury reached a seriously erroneously result and must state its reasons for this belief. (citations omitted)

¶ 5. *Blake v. J.C. Penney Co.*, Inc., 894 F.2d 274, 281 (8th Cir. 1990). The Court finds that the verdict is not against the weight of the evidence, that the result is not seriously erroneous and that the jury's verdict must stand.

¶ 6. In addition to plaintiffs' challenge to the weight of the evidence, they assert numerous errors by the Court, including the admission of evidence, rulings on witness

testimony and cross examination, and jury instructions. The Court is not persuaded by plaintiffs' arguments, and the Court notes that each of the asserted errors were fully litigated by the parties prior to the Court's rulings on these matters. Therefore the Court will not disturb the verdict of the jury, and will not order a new trial.

¶ 7. Next the Court will address defendants' motion for attorneys' fees and bill of costs. Citing 17 U.S.C. § 505, defendants have submitted a motion to recover $1,242,325.04 in attorney's fees and to recover $35,973.11 in costs incurred in defending this action. Whether to award attorney's fees to a prevailing party under § 505 is a matter within the Court's discretion. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994); *Mary Ellen Enterprises v. Camex, Inc.*, 68 F.3d 1065, 1072 (8th Cir. 1995); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 122 (8th Cir. 1987). Exercising that discretion, the Court will deny defendants' motion for attorneys' fees and bill of costs.

¶ 8. Finally, the Court will address the motion of plaintiffs' counsel to withdraw from this case. Although the motion may be moot in light of the above rulings, the Court must agree with plaintiffs' counsel, Green, Schaaf & Margo, P.C.. and allow them to withdraw. On February 13, 1998, plaintiffs filed, pro se, several affidavits and documents that included attorney client correspondence and statements directly adverse to the attorney-client relationship between plaintiffs and plaintiffs' counsel. Although the Court returned these materials to plaintiffs along with a letter on February 17, 1998, service copies of these materials were

sent directly to defendants. Plaintiffs put statements in the materials indicating that they had terminated Green, Schaaf & Margo, P.C. Until the time these materials were distributed, Green, Schaaf & Margo, P.C. had not been informed of this fact by plaintiffs, and in fact were working on post-trial motions on his behalf. Admirably, Green, Schaaf & Margo, P.C. completed plaintiffs' post-trial motions after plaintiffs' actions. It is clear to this Court that the plaintiffs' actions have created and [sic] untenable situation and that Green, Schaaf & Margo, P.C. must be allowed to withdraw in accordance with [Missouri] Supreme Court Rule 1.16.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for new trial [Document #202] is DENIED.

IT IS FURTHER ORDERED that defendant's motion for attorney fees [Document #0] is DENIED.

IT IS FURTHER ORDERED that defendants' bill of costs [Document #0] is DENIED. Each party shall bear their own costs.

IT IS FURTHER ORDERED that the motion of plaintiffs' attorneys Green, Schaaf & Margo, P.C. to withdraw as counsel to plaintiffs [Document #203] is GRANTED.

Dated this 19th day of March, 1998.

/s/ E. Richard Webber
E. Richard Webber
United States District Judge

UNITED STATES DISTRICT COURT
Eastern Division of Missouri
1114 Market Street
St. Louis, Missouri 63101
Telephone: 314-539-2315

Robert D. St. Vrain
Clerk of Court

February 17, 1998

Stephen Burns Kessler
639 West Rose Hill
Kirkwood, MO 63122

RE: Kessler v. Crichton, et al.
4:96CV01125 ERW

Dear Mr. Kessler:

Enclosed please find your "Exhibits Supporting Plaintiff's Motion For New Trial" which was received by our office on 2/13/98. As you are currently represented by counsel, this office cannot accept any pleadings directly from you. Only your counsel of record may file pleadings with the Court. If you have any questions, please contact this office.

Sincerely,
Robert D. St. Vrain, Clerk
/s/ Gilbert N. Beckemeier, III
Gilbert N. Beckemeier, III
Deputy Clerk

CC: File
All Counsel of Record.

UNITED STATES DISTRICT COURT
Eastern Division of Missouri

JUDGMENT IN A CIVIL CASE
CASE NO. 4:96CV01125 ERW

FILED JANUARY 28, 1998

KEPSFILMS, INC.
Plaintiff

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC.
Defendants

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury returned its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that judgment was entered in favor of Defendants Michael Crichton, Anne-Marie Martin, Amblin' Entertainment, Inc., Steven Spielberg, Warner Bros. Inc., Universal City Studios, Inc. and against Plaintiff KEPSFilms, Inc., KEPSFilms, Inc. shall take nothing.

Robert D. St. Vrain, Clerk
"s/ Melanie C. Berg"
Melanie C. Berg, Deputy Clerk
Date: January 28, 1998

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
CASE NO. 4:96CV01125 ERW

FILED JUNE 4, 1996

STEPHEN B. KESSLER,
KEPSFILMS, INC.
Plaintiffs,

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC.
Defendants.

Jury Trial Demanded

COMPLAINT
(COPYRIGHT INFRINGEMENT)

Plaintiffs attest:

¶ 1. Plaintiff Stephen Burns Kessler is a citizen and resident of St. Louis County, Missouri. He is a writer, director and film maker. In 1989, Mr. Kessler wrote a screenplay about two teams of tornado chasers in the State of Oklahoma. He titled the screenplay "Catch The Wind." Mr. Kessler applied for a United States copyright for "Catch The Wind" on September 25, 2989, pursuant to 17 U.S.C. §101 et seq., (the "Copyright Act"). Later versions of "Catch The Wind" also received copyrights.

¶ 2. Plaintiff KEPSFilms, Inc. ("KEPSFilms") is a Missouri corporation in good standing that was designated as the "Employer for Hire" of Mr. Kessler regarding the copyright registration that forms the basis of this Complaint. The two plaintiffs will hereafter be referred to collectively as "Plaintiff."

¶ 3. Defendant Michael Crichton is a citizen and resident of the State of New York. Crichton, and co-defendant Anne-Marie Martin, his wife, claim to be the authors of a screenplay which was made into a recently released movie known as "Twister." As alleged in greater detail herein, Crichton had access to "Catch The Wind," and then allegedly co-wrote "Twister," which is substantially and remarkably similar to "Catch The Wind." Crichton copied "Catch The Wind" in violation of the Copyright Act, to the detriment of Plaintiff. Crichton is also a producer of "Twister." Crichton is liable to Plaintiff as a direct infringer of Plaintiff's copyright. Crichton is also liable under the theory of vicarious liability in that he had the ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich himself through a direct financial interest in "Twister." Crichton is also liable to Plaintiff under the theory of contributory infringement in that his conduct formed part of, and furthered, the exploitation of "Catch The Wind" and he contributed the means by which the infringement took place.

¶ 4. Defendant Anne-Marie Martin ("Martin") is a citizen of the State of New York. She is the wife of Crichton, and claims to be the co-author of "Twister." Martin had access to "Catch The Wind," and allegedly co-wrote "Twister," which is substantially and remarkably similar to "Catch The Wind." Martin and her husband copied "Catch The Wind" in violation of the Copyright Act, to the detriment of Plaintiff. Crichton and Martin were paid in excess of $2.5 million from the other Defendants for the rights to "Twister," a sum that should have been paid to Plaintiff. Martin is liable to Plaintiff as a direct infringer of Plaintiff's copyright. Martin also is liable under the theory of vicarious liability in that she had the ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich herself through a direct financial interest in "Twister." Martin also is liable to Plaintiff under the theory of contributory infringement in that her conduct formed part of, and furthered, the exploitation of "Catch The Wind" and she contributed the means by which the infringement took place.

¶ 5. Amblin' Entertainment, Inc. ("Amblin'") is a California corporation in good standing with its principle place of business in Beverly Hills, California. At all times relevant hereto, Amblin' by and through its officers and directors, provided the capital to produce the film and acted as "Twister's" producer. Amblin' is liable to Plaintiff as a direct infringer of Plaintiff's copyright. Amblin' also is liable under the theory of vicarious liability in that it had the

ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich itself through a direct financial interest in "Twister." Amblin' is also liable to Plaintiff under the theory of contributory infringement in that its conduct formed part of, and furthered, the exploitation of "Catch The Wind" and it contributed the cameras, locations, props, actors and other means by which the infringement took place.

¶ 6. Steven Spielberg ("Spielberg") is an individual who is a citizen and resident of the State of California. At all times relevant hereto, Spielberg was the President of Amblin' and also served as one of the Executive Producers of "Twister." Spielberg is liable to Plaintiff as a direct infringer of Plaintiff's copyright. Spielberg also is liable under the theory of vicarious liability in that he had the ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich himself through a direct financial interest in "Twister." Spielberg also is liable to Plaintiff under the theory of contributory infringement in that his conduct formed part of, and furthered, the exploitation of "Catch The Wind" and he contributed the means by which the infringement took place.

¶ 7. Warner Bros., Inc. ("Warner Bros.") is a Delaware corporation with its principal place of business in New York. Warner Bros., and co-defendant Universal Studios, are owners of the copyright for the screenplay and the film "Twister." At all times relevant hereto, Warner Bros. contracted to distribute "Twister" as an agent of, and on

behalf of, the other defendants in the United States, for a fee, and has done so, and continues to do so. It is liable to Plaintiff under the theory of vicarious liability in that it had the ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich himself through a direct financial interest in "Twister." Warner Brothers also is liable to Plaintiff under the theory of contributory infringement in that its conduct formed part of, and furthered, the exploitation of "Catch The Wind" and it contributed the means by which the infringement took place.

¶ 8. Universal City Studios, Inc. ("Universal Studios") is a Delaware corporation with it principal place of business located in California. As alleged, Universal Studios is the co-owner of the copyright for the screenplay and film "Twister." At all times relevant, Universal Studios contracted to distribute "Twister" as an agent of, and on behalf of, the other defendants outside the United States, for a fee, and has done so, and continues to do so. It is liable to Plaintiff under the theory of vicarious liability in that it had the ability to prevent the infringement but instead chose to coalesce to the acts of the other defendants in order to enrich himself through a direct financial interest in "Twister." Universal Studios also is liable to Plaintiff under the theory of contributory infringement in that its conduct formed part of, and furthered, the exploitation of "Catch The Wind" and it contributed the means by which the infringement took place.

JURISDICTION AND VENUE

¶ 9. This Court has original jurisdiction under 28 U.S.C. §1338 as the case involves a cause of action arising under the Copyright Act.

¶ 10. Venue is proper in this District pursuant to 28 U.S.C. §1400(a) in that some or all of the Defendants do business within the Eastern District of Missouri, and either they themselves, or their agents reside or can be found here.

PRELIMINARY STATEMENT

¶ 11. In 1989, Plaintiff began work on "Catch The Wind," a screenplay about two competing tornado chase teams in the State of Oklahoma. A copy of "Catch The Wind" is attached hereto as Exhibit A. "Catch The Wind" is unique in that prior to it being written there was no screenplay ever written and no fictional movie ever made about tornado chasers. Unlike most other copyright infringement cases, where the infringing product is in some ways similar to many different movies or screenplays, "Catch The Wind" was, until "Twister," the only fictional account of tornado chasing. As shown in this Complaint, "Twister" is not only substantially similar to "Catch The Wind," it is remarkably similar beyond all possibility of coincidence. The Defendants herein wrongfully appropriated the copyrighted work belonging to the Plaintiff for their own financial gain.

¶ 12. "Catch The Wind" is an action oriented screenplay woven around a story of the main character's personal loss, and subsequent attempt at revenge adjacent God and nature. The storyline also contains an eventual love interest. In developing "Catch The Wind," Plaintiff spent hundreds of hours researching tornadoes and tornado chase teams, interviewing various experts in tornado research at the University of Oklahoma and other places, and eventually writing a "treatment" (a synopsis of the story). Thereafter Plaintiff wrote four finished drafts of the screenplay.

¶ 13. At all times, Plaintiff's plan in writing "Catch The Wind" was to sell the screenplay to a large production company since he envisioned that a movie made from "Catch The Wind" would be expensive and require dynamic special effects in order to be successful.

¶ 14. In or about October, 1989, Plaintiff was notified that he was a finalist in the Academy of Motion Picture Arts & Sciences Nicholl Screenwriting competition in Beverly Hills, California for a prior screenplay he has written, titled "No Greater Love." The Academy requested Plaintiff send a treatment of a screenplay that he envisioned writing if he were selected by the Academy to receive a cash grant. Plaintiff then wrote the treatment of "Catch The Wind" and filed a copyright registration prior to submitting the work to the Academy judges. A copy of the Copyright Registration for the treatment is attached hereto as Exhibit B. In 1990 the treatment of "Catch The Wind" advanced to

the quarterfinal round of the competition, meaning that it was one of the top 182 screenplays of 2, 888 entries.

¶ 15. In 1991, Plaintiff wrote the full screenplay of "Catch The Wind" and again entered a copyrighted and revised version in the Nicholl competition. Plaintiff registered all drafts of "Catch The Wind" as they were completed. A copy of each such registration is attached hereto as Exhibits C through G. This time "Catch The Wind" advanced into the semifinal round of the competition. In doing so, "Catch The Wind" was one of 100 entries that received semifinal recognition. In all there were 3,813 entrants.

CAUSE OF ACTION

¶16. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 15 as though fully set forth herein.

¶ 17. Plaintiff's ownership of the copyright herein is based on the originality of his work, the copyrightability of the subject matter of "Catch The Wind," Plaintiff's United States citizenship, and his compliance with the applicable statutory formalities in applying for, registering and receiving a copyright.

¶ 18. Defendants are liable to Plaintiff under the Copyright Act in that they had access to "Catch The Wind," and "Catch The Wind" and "Twister" are substantially similar.

¶ 19. Defendants had access as follows:

(A) In or about December, 1989, Plaintiff's agent sent a copy of "Catch The Wind" to Gerald R. Molen at Amblin' for his review and for review of others at Amblin'. As this time, Molen and many others at Amblin' had access to "Catch The Wind." Molen later became one of the producers of "Twister." The screenplay was never returned to Plaintiff and to this day, Amblin' and its employees have "Catch The Wind" in their possession. Plaintiff, and others representing Plaintiff, have discussed "Catch The Wind" with Molen since then on several occasions.

(B) On or about December 6, 1989, Plaintiff met personally with Jimmy Jacks, who at that time was Head of Production at Universal Studios. Mr. Jacks requested and received a copy of the "Catch The Wind" treatment at that meeting. Plaintiff later sent a copy of the finished screenplay to Jacks in April 1990.

(C) On or about December 7, 1989, Plaintiff delivered a copy of "Catch The Wind" to Joel Wayne, who at that time was a Senior Vice-President of Defendant Warner Bros. In April, 1990, Plaintiff delivered a copy of the finished screenplay to Wayne. Thereafter, Plaintiff and Wayne discussed "Catch The Wind" on several occasions. Finally a third copy of "Catch The Wind" was sent to Wayne in 1991.

(D) In or about November, 1990, Plaintiff delivered a copy of "Catch The Wind" to Bryan Lourde at Creative Artists Agency [CAA]. Plaintiff then met with Lourde and

discussed "Catch The Wind" at length. Lourde kept a copy of "Catch The Wind." CAA represents defendant Crichton.

¶ 20. In or about 1993, Defendants Crichton and Martin began writing "Twister" by copying Plaintiff's screenplay in violation of the Copyright Act and misappropriating his work as their own. Defendants Crichton and Martin used "Catch The Wind" as their model, template and inspiration in writing the screenplay "Twister." Their screenplay, and the movie made from it, are substantially and remarkably similar to "Catch The Wind."

¶ 21. "Catch The Wind" and "Twister" are substantially similar in several respects, including, but no limited to:

(A) **The Story Line**: In "Catch The Wind" the central character loses his wife and child to a tornado, suffering overwhelming grief. He then sets off on an obsessive quest, at the cost of his personal life, to get even with God and nature by chasing tornadoes in an effort to collect scientific data to provide others with earlier warning of approaching tornadoes and thereby avenge the death of his wife and family. In "Twister the central character loses her father to a tornado, suffering overwhelming grief. She then sets off on an obsessive quest, at the cost of her personal life, to get even with God and nature by chasing tornadoes in an effort to gather scientific data to provide others with earlier warning of approaching tornadoes and thereby avenge the death of her father.

(B) **The Central Scientific Device:** In "Catch The Wind," the tornado chasers have developed an unprecedented, advanced, electronically sophisticated scientific apparatus which will, when placed in the path of a tornado, obtain computer generated data to assist in the development of an early warning system. In "Twister," the tornado chasers have developed an unprecedented, advanced, electronically sophisticated scientific apparatus which will, when placed in the path of a tornado, obtain computer generated data to assist in the development of an early warning system. In "Catch The Wind," probe devises were dropped into the tornado. In "Twister," probe devices were sucked up into the tornado.

(C) **The Name of the Device:** In "Catch The Wind," the aforementioned apparatus is named "TOTO II", a reference to the movie "The Wizard of Oz" (scenes from which appear on a television screen within the screenplay and show Judy Garland as "Dorothy" singing "Over The Rainbow"). In "Twister," the apparatus is named "Dorothy," a reference to "The Wizard of Oz" (and on the face of the apparatus is a painting of Judy Garland as "Dorothy").

(D) **The Action:** In reality, tornado chase teams do not compete with each other, but in "Catch The Wind," the story is of two competing chase teams vying for the opportunity to reach oncoming tornadoes first. In "Twister," the story is of two competing tornado chase teams vying for the opportunity to reach oncoming tornadoes first.

(E) **The Sub-Plot:** In "Catch The Wind," the tornado chase is a vehicle to tell a love story. In "Twister," the tornado chase is a vehicle to tell a love story.

(F) **Additional Sub-Plots:** In "Catch The Wind" the competing interest in a love triangle is a female therapist. In "Twister," the competing interest in a love triangle is a female therapist.

(G) **Additional Sub-Plots:** In "Catch The Wind" the top tornado chaser does not rely on the fancy, sophisticated weather monitoring equipment to locate tornadoes, but instead mystically reads storm locations with "gut instincts." In "Twister," the top tornado chaser does not rely on the fancy, sophisticated weather monitoring equipment to locate tornadoes, but instead mystically reads storm locations with "gut instincts."

(H) **Additional Sub-Plots:** In "Catch The Wind" the central character's advisor is an older male relative whose life the central character saves. In "Twister," the central character's advisor is an older female relative whose life the central character saves.

(I) **Plot Development:** In "Catch The Wind" the main tornado chase team is sponsored by a University and is in danger of losing its grant money. In "Twister," the main tornado chase team is sponsored by a University and is in danger of losing its grant money.

(J) **Plot Development:** In "Catch The Wind" the other tornado chase team is sponsored by a corporation. In

"Twister," the other tornado chase team is sponsored by a corporation. In reality, there are no tornado chase teams sponsored by corporations.

(K) **Additional Sub-Plots:** In "Catch The Wind" the leader of the protagonist chase team once worked together and was friends with the leader of the antagonist tornado chase team. In "Twister," the leader of the protagonist chase team once worked together and was friends with the leader of the antagonist tornado chase team.

(L) **Dialogue:** In "Catch The Wind," the drama of the tornado is introduced with the phrase "kiss the face of God." In "Twister," the drama of the tornado is introduced with the phrase "the finger of God."

(M) **Scene Similarity:** In "Catch The Wind," near the end of the screenplay the central character is saved by holding onto a pipe buried deep in the ground and thereby avoids being sucked up inside the tornado funnel. In "Twister," near the end of the movie, the central character is saved by holding onto a pipe buried deep in the ground and thereby avoids being sucked up inside the tornado funnel.

(N) **Scene Similarity:** In "Catch The Wind," the tornado chase teams collide on a small country road while chasing a storm, forcing the antagonist chase team off the road. In "Twister," the tornado chase teams collide on a small country road while chasing a storm, forcing the antagonist chase team off the road.

(O) **Scene Similarity:** In "Catch The Wind," the central character sees residents of the town decimated by a tornado and flashes back to his deceased wife and child. In "Twister," the central character sees residents in a town decimated by a tornado and flashes back to her deceased father and herself as a child.

(P) **Scene Similarity:** In "Catch The Wind," the two main characters risk their lives to save someone buried in a building collapsed by a tornado and only narrowly escape before the building completely caves in. In "Twister," the two main characters risk their lives to save someone buried in a building collapsed by a tornado and only narrowly escape before the building completely caves in.

(Q) **Plot Development:** In "Catch The Wind," the leader of the protagonist tornado chase team is the designer and builder of "Toto II." In "Twister," the leader of the protagonist tornado chase team is the designer and builder of "Dorothy."

(R) **Plot Development:** In "Catch The Wind," a small Oklahoma town is leveled by a tornado. In "Twister," a small Oklahoma town is leveled by a tornado.

(S) **Plot Development:** In "Catch The Wind," the apparatus "Toto II" fails to work at the critical moment when a massive tornado is heading directly at it. In "Twister," he apparatus "Dorothy" fails to work at the critical moment when a massive tornado is heading directly at it.

(T) **The Climax:** In "Catch The Wind," the tornado chase teams are confronted with the largest tornado to hit the Midwest United States in 50 years. In "Twister," the tornado chase teams are confronted with the largest tornado to hit the Midwest United States in 30 years.

(U) **The Pace:** In "Catch The Wind," the pace is furious and non-stop relying on special effects to carry this action and adventure story. In "Twister," the pace is furious and non-stop relying on special effects to carry this action and adventure story.

(V) **The Time and Location:** "Catch The Wind" takes place in current day Oklahoma. "Twister" takes place in current day Oklahoma.

(W) **Additional Storyline:** In "Catch The Wind" the competing interest in the love triangle is a non-storm chased who inadvertently end up going on a tornado chase. In "Twister," the competing interest in the love triangle is a non-storm chased who inadvertently end up going on a tornado chase.

(X) **Scene Similarities:** In "Catch The Wind" tornadoes are analogized to wild animals and called a "beast." In "Twister tornadoes are analogized to wild animals and called a "beast."

(Y) **Character Similarities:** Virtually all of the corresponding characters in "Twister" are the same ages as their counterparts in "Catch The Wind."

(Z) **Plot Development:** In "Catch The Wind," the head of the protagonist chase team is at first reluctant to go on the chase. In "Twister" the head of the protagonist chase team is at first reluctant to go on the chase.

(AA) **Additional Storyline:** In "Catch The Wind" the University chase team updates storms by getting information from the National Severe Storm Lab computer station, while the corporate chase team gets updates through their corporate computer lab. In "Twister" the University chase team updates storms by getting information from the National Severe Storm Lab computer station, while the corporate chase team gets updates through their corporate computer lab.

(BB) **Scene Similarities:** In "Catch The Wind" the space shuttle passes our point of view and reveals a massive lightning storm on the dark side of the Earth over North America. In "Twister" a satellite passes our point of view and reveals a massive lightning storm on the dark side of the Earth over North America.

(CC) **Scene Similarities:** In "Catch The Wind" the central character is told that his irrational behavior won't bring back his wife and family. In "Twister" the central character is told that her irrational behavior won't bring back her father.

(DD) **Scene Similarities:** In both "Catch The Wind" and "Twister" one tornado chase team leader tries to save

the life of the competing chase team leader from an oncoming tornado.

(EE) **Closing Scene:** In "Catch The Wind" the closing scene is a ground to air helicopter aerial of the two central characters, having survived the tornado, embracing as the chase team drives up the country road to meet them. In "Twister" the closing scene is a ground to air helicopter aerial of the two central characters, having survived the tornado, embracing as the chase team drives up the country road to meet them.

¶ 22. Because of Defendants' wrongful acts and the existence of aforementioned similarities, and others, "Catch The Wind" and "Twister" have the same fundamental essence and structure. "Twister" does not merely copy Plaintiff's idea, but copies the expression of the ideas contained in "Catch The Wind," leading to the inescapable conclusion that "Catch The Wind" and "Twister" are substantially and remarkably similar. Defendants have infringed Plaintiff's copyright and screenplay.

¶ 23. Pursuant to §504(b) of the Copyright Act, Plaintiff is entitled to recover the actual damages suffered by him as a result of the infringement and any profits of the infringers that are attributable to the infringement, together with reimbursement of all expenses, including but not limited to travel and research, as well as the value of time expended in writing "Catch The Wind." These damages and profits will be proven at trial, but are known to be in excess of $50,000,000. In addition, it is anticipated that Plaintiff's

damages will continue to increase over time, as "Twister" continues to generate income by, 1) taking in large box office receipts at theaters throughout the United States and other countries; 2) generating merchandising opportunities; 3) being released on video; 4) having its television and TV movie rights sold; 5) selling the soundtrack; 6) theme park exhibit usage; 9) computer-oriented CD ROM programming; and 10) all other avenues available for the realization of revenue.

¶ 24. Plaintiff, pursuant to the Copyright Act, also is entitled to reimbursement of his costs of suit and attorney's fees, amounts that shall be proven at trial.

WHEREFORE, Plaintiffs Stephen Burns Kessler and KEPSFilms, Inc., request the Court award them their actual damages and all of the profits realized by Defendants as a result of their copyright infringement in an amount to be proven at trial, together with costs of suit, attorney's fees, pre-judgment and post-judgment interests, and for such other relief as to which they may be entitled.

Green, Schaaf & Margo, P.C.
"s/ Mitchell A. Margo"
Mitchell A. Margo

Martin Green #3265
Mitchell A Margo #3742
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Attorneys for Plaintiff
7733 Forsyth Blvd., Suite 800
Clayton, Missouri 63105
314-862-6800 FAX: 314-862-1606

CERTIFICATE OF COPYRIGHT REGISTRATION
Form TX

Registration Number: TXu 410-91

Effective Date Of Registration: September 25, 1989

Title of This Work:

CATCH THE WIND SYNOPSIS

Name of Authors:

KEPSFilms, Inc., employer for hire of Stephen Burns Kessler

Year which this work was completed: 1989

Copyright Claimants:

KEPSFilms, Inc.
639 West Rose Hill
Kirkwood, Missouri 63122

Transfer:

KEPSFilms, Inc. employer for hire of Stephen Kessler

Application Received: September 25, 1989

Certification:
Owner of Exclusive Rights: KEPSFilms, Inc.

Signature: "s/ Stephen Kessler"

CERTIFICATE OF COPYRIGHT REGISTRATION
Form PA

Registration Number: PAu 1 390 628

Effective Date Of Registration: March 13, 1990

Title of This Work:

CATCH THE WIND [SCREENPLAY]

Name of Authors:

KEPSFilms, Inc., employer for hire of Stephen Burns Kessler

Year which this work was completed: 1990

Copyright Claimants:

KEPSFilms, Inc.
639 West Rose Hill
Kirkwood, Missouri 63122

Transfer:

KEPSFilms, Inc. employer for hire of Stephen Kessler

Application Received: March 13, 1990

Certification:
Owner of Exclusive Rights: KEPSFilms, Inc.

Signature: "s/ Stephen Kessler"

CERTIFICATE OF COPYRIGHT REGISTRATION
Form PA

Registration Number: PAu 1 357 170

Effective Date Of Registration: June 22, 1990

Title of This Work:

CATCH THE WIND [SCREENPLAY]

Name of Authors:

KEPSFilms, Inc., employer for hire of Stephen Burns Kessler

Year which this work was completed: 1990

Copyright Claimants:

KEPSFilms, Inc.
639 West Rose Hill
Kirkwood, Missouri 63122

Transfer:

KEPSFilms, Inc. employer for hire of Stephen Kessler

Application Received: June 22, 1990

Certification:
Owner of Exclusive Rights: KEPSFilms, Inc.

Signature: "s/ Stephen Kessler"

CERTIFICATE OF COPYRIGHT REGISTRATION
Form PA

Registration Number: PAu 1 524 356

Effective Date Of Registration: June 24, 1991

Title of This Work:

CATCH THE WIND: SCREENPLAY

Name of Authors:

KEPSFilms, Inc., employer for hire of Stephen Burns Kessler

Year which this work was completed: 1990

Copyright Claimants:

KEPSFilms, Inc.
639 West Rose Hill
Kirkwood, Missouri 63122

Transfer:

KEPSFilms, Inc. employer for hire of Stephen Kessler

Application Received: June 24, 1991

Certification:
Owner of Exclusive Rights: KEPSFilms, Inc.

Signature: "s/ Stephen Kessler"

KEPSFilms, Inc.
639 West Rose Hill
Kirkwood, Mo. 63122
314-966-0214 FAX 314-822-8526 / In L.A. 213-545-6039

[Resume] 1991

Stephen Burns Kessler
Screenwriter of "Catch The Wind"

- Stageplays: 3
- Screenplays: 5
- Symphonic Compositions: 15
- Commercial Music & Soundtracks: 73
- Multi-Image Productions: 11
- Producer/Director Short Films: 3
- Producer/Director TV Film Commercials: 35

Mr. Kessler owns a Mid-West Production Company. Aside from his duties with Kessler Productions and KEPSFilms, Inc., he is a Scriptwriting and Film Scoring adjunct Professor at Webster University, Webster Groves, Missouri. He attended St. Louis University, and while pursuing a masters in Psychology, was hired by D'Arcy Advertising as a copywriter and Jingle Writer for their national accounts. He left after being commissioned to write a Symphonic Score for the St. Louis Symphony Youth Orchestra by conductor-composer, Maestro Leonard Slatkin. As a recipient of a 1976 Bi-Centennial Commission, he composed "Rhapsody Of The Voyager," for the Springfield Symphony Orchestra. His Symphonic compositions and Productions in Multi-Image have been widely heard and seen in the United States, Europe, Australia and Japan, and have received numerous international awards, including two "Best Soundtrack" and three "Best Of Show" from the Association for Multi-Image International. His 13 years experience as a film director, writer, composer, performer and producer, culminated in a short film entitled "Reno Street" that won top honors from the International Film and Television Festival of New York. His commercial work has earned Clios, New York Festivals, Addys and Regional Emmy Awards. His first screenplay, "No Greater Love" was commissioned for stage adaptation by the Repertory Theater Of St. Louis and performed in 1991. He resides in Kirkwood, Missouri with his wife Mary and their little girls, Effie and Emma.
Representation: Zifferen, Brittenham & Branca, Los Angeles.

Supreme Court, U.S.
FILED
DEC 21 2000
CLERK

(2)

DOCKET NO. 00 - 877

In The

Supreme Court Of The United States

STEPHEN BURNS KESSLER,
Petitioner,

KEPSFILMS, INC.,
Plaintiff,

vs.

MICHAEL CRICHTON, ANNE MARIE MARTIN,
STEVEN SPIELBERG,
AMBLIN' ENTERTAINMENT, INC.,
WARNER BRO., INC. &
UNIVERSAL STUDIOS, INC.,
Respondents.

On Petition From An Appeal To The Eighth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN BURNS KESSLER
Petitioner
639 West Rose Hill
Kirkwood, Missouri 63122
314-966-0214

Petitioner, Pro Se

21pp

SUPPLEMENTAL QUESTIONS FOR REVIEW

1. IS IT DENIAL OF FIFTH AMENDMENT DUE PROCESS FOR A COURT TO ISSUE JUDGMENT ON A MOTION PENDING BEFORE IT WITHOUT ALLOWING PROPER OPPOSITION ARGUMENT?

2. IF LOWER COURT ORDERS EXPRESS DOUBT ABOUT THE MEANING OF THE LAW AND THE APPELLATE COURT UPHOLDS THE LOWER COURT JUDGMENT WITHOUT QUESTION, HAS THE APPELLATE COURT UPHELD DOUBT ABOUT THE MEANING OF THE LAW?

3. WHEN COURTS EXPRESS DOUBT ABOUT THE MEANING OF THE LAW AND THE CONSTITUTIONAL QUESTION IS CALLED BY A PARTY BEFORE THE COURT, IS THE APPELLATE COURT MINISTERIALLY OBLIGATED UNDER FEDERAL RULE OF APPELLATE PROCEDURE, RULE 44 TO NOTIFY THE EXISTENCE OF SAID QUESTIONS TO THE ATTORNEY GENERAL OF THE UNITED STATES?

4. PRIOR TO ISSUANCE OF FINAL JUDGMENT SHOULD THE COURT FIRST RULE ON A TIMELY SUBMITTED CERTIFICATION OF CONSTITUTIONAL QUESTIONS STILL PENDING BEFORE IT?

5. IS IT UNCONSTITUTIONAL FOR THE APPELLATE COURT TO ISSUE FINAL MANDATE AS RATIONALE TO RENDER MOOT A TIMELY SUBMITTED MOTION FOR CERTIFICATION OF CONSTITUTIONAL QUESTIONS?

6. IS SAID ACTION ON THE PART OF THE COURT ESSENTIALLY AN UNCONSTITUTIONAL FORM OF PRIOR RESTRAINT UNDER THE FIRST AMENDMENT AS IT RENDERS MOOT THE CONSTITUTIONAL QUESTIONS SINCE FINAL JUDGMENT WAS CONSIDERED ISSUED?

7. IF THE COURT FAILS TO CERTIFY QUESTIONS ALLOWING CONFUSION OF LAW TO STAND DOES THE COURT'S ACTION PREJUDICE FUTURE LITIGANTS IN SIMILAR ACTIONS?

8. IF DIRECT APPEAL TO THE SUPREME COURT IS UNAVAILABLE ON DECISIONS FROM A COURT OF APPEALS THAT CONSTITUTIONALLY INVALIDATES AN ACT OF CONGRESS - IS THE REPEAL OF TITLE 28 U.S.C. § 1252 UNCONSTITUTIONAL UNDER ARTICLE I AND ARTICLE III BY ENABLING VIOLATIONS IN THE FIRST AND FIFTH AMENDMENT TO STAND UNOPPOSED CONTRARY TO THE TENNETS OF THE CONSTITUTION OF THE UNITED STATES?

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   A. **The Court instead ruled for respondents' motion on November 13, 2000, technically the day after receiving said motion. Federal Rule Of Civil Procedure, Rule 6(a), allows 8 days excluding holidays and weekends for Petitioner to respond to said motion.** 4

   B. **The District Court usurped its power by denying due process right to respond by Petitioner.** 4

2. **The respondents' motion cites the Appellate Court denial of Stay of Mandate and Petitioner's Certification of Constitutional Questions as modality for their argument that "all matters were resolved."** 5

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3. **The disallowed opposition argument asserts the Appellate Court's earlier judgments rendering moot certification procedure usurped discretion by denying Certification of Constitutional Questions to the Attorney General of the United States contrary to its statutory mandate pursuant to Fed. R. App. P. 44 and Title 28 U.S.C. 2403(a).** 5

4. **The Appellate Court's failure to uphold its mandate pursuant to Title 28 U.S.C. § 2403(a) and Fed. R. App. P. 44 to certify the constitutional questions allows a live controversy to exist in this case. Simply stated, if every Court upheld doubt about the meaning of the law as modality for its judgments, then its judgments and the law itself would have no meaning whatsoever. That violates constitutional law.** 9

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SUPPLEMENTAL BRIEF TO PETITION

Stephen Burns Kessler respectfully submits a Supplemental Brief in support of the Petition For Writ of Certiorari. Petitioner requests that the Supreme Court of the United States review the judgments of the Eighth Circuit Court of Appeals with respect to judgments by the United States District Court made after Petition For Certiorari #00 - 877 was put before this Honorable and Esteemed Court.

OPINIONS BELOW

The final judgment of the Eighth Circuit Court Of Appeals is unreported and printed in App. 1 of Petition For A Writ Of Certiorari. The opinions of the Eighth Circuit Court of Appeals are unreported are printed in Appendices 4, 5, 6 of Petition For A Writ Of Certiorari. Judgments of the District Court are found in Appendices 7, 17, 21 and 22. of Petition For A Writ Of Certiorari. The District Court's ruled document of November 13, 2000 is in App. 1, herein.

JURISDICTION

Jurisdictional statement can be found on page 1 of Petition For A Writ Of Certiorari. This supplement to the Petition For A Writ Of Certiorari arises out of the District Court judgment of November 13, 2000, currently under appeal to the Eighth Circuit Court of Appeals under Fed. R. Civ. P. 60(b)(4) through Notice of Appeal, November 27, 2000.

Supreme Court Rule 29.4(b) Requirement: Pursuant to directives in 28 U.S.C. § 2403(a) petitioner calls to question the constitutionality of the Acts Of Congress, 17 U.S.C. § 501, (jurisdiction under "The Copyright Act"), through rulings by courts defined by 28 U.S.C. § 451 with citation that 28 U.S.C. § 2403(a) may apply with service of this petition to the Solicitor General of the United States. The Appellate Court refused to perform its ministerial obligation to certify existence of said questions pursuant to Fed. R. App. P. 44, an act deserving proper judicial review.

CONSTITUTIONAL PROVISIONS STATUTES & REGULATIONS

Constitution Of The United States of America: **Article I** separation of powers; and **Article III**, power invested in the judiciary.

The First Amendment: "Congress shall make no law...abridging the freedom of speech...and the right to petition the Government for redress of grievances." **The Fourth Amendment:** "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." **The Fifth Amendment:** "nor shall any person be subject to the same offense to be twice put in jeopardy"; "nor be deprived of life, liberty, or property without due process of law."

Title: 17 U.S.C. § 501, jurisdiction "Copyright Act," stating in part: Only the holder of the copyright has authority to bring forth suit.

Federal Rules of Appellate Procedure, Rule 44, Cases Involving Constitutional stating: the court is obligated by law to certify existence of Constitutional questions to the Attorney General Of The United States.

SUPPLEMENTAL STATEMENT OF THE CASE

On June 17, 1997, the District Court issued a Protective Order with respect to return of confidential discovery documents in this case. On August 11, 2000 the Eighth Circuit Court of Appeals issued mandate in this case rendering Petitioner's constitutional questions as moot. Pet. App. 5, 6. On October 24, 2000, petitioner filed Petition For A Writ of Certiorari to the Supreme Court Of The United States, docketed # 00 – 877 on November 29, 2000. On November 9, 2000, respondents filed a Motion To Enforce Court Order of June 17, 2000 to the District Court demanding return of all confidential discovery documents in this case. On the second day of receipt of said motion, the Court entered judgment in favor of respondents' without allowing proper opposition argument to be put forth by Petitioner. *See* App. 1, herein. On November 27, 2000, Petitioner filed an appeal from the District Court's order to the Eighth Circuit Court of Appeals pursuant to Fed. R. Civ. P., Rule 60(b)(4) due to usurpation of power. On December 13, 2000, respondents waived right to respond to Petition for Writ Of Certiorari in the Supreme Court of the United States enabling, after ten days, a ruling by the Supreme

Court on the Petition before it prior to its consideration of actions pending in the current appeal. Further, on December 19, 2000 respondents' filed a separate law suit in the District Court, case # 4:00CV02011ERW demanding all of Petitioner's copyrighted works to sell off to pay the $35,973 constitutionally questionable judgment. This case is before the same judge who denied due process to Petitioner.

REASONS FOR SUPPLEMENT TO PETITION

Supplemental Brief is appropriate as the recent judgments by the United States District Court for the Eastern District of Missouri, Eastern Division has so far departed from the accepted and usual course of judicial proceedings and said departure was enabled through constitutionally questionable rulings by the Eighth Circuit Court Of Appeals that it calls for exercise of the Supreme Court's supervisory powers.

1. The District Court denied due process to Petitioner by disallowing proper opposition argument from Petitioner over respondents November 9, 2000 Motion To Enforce Court Order.

A. The Court instead ruled for respondents' motion on November 13, 2000, technically the day after receiving said motion. Federal Rule Of Civil Procedure, Rule 6(a), allows 8 days excluding holidays and weekends for Petitioner to respond to said motion.

B. The District Court usurped its power by denying due process right to respond by Petitioner.

This post-Petition action by the District Court indicates the lack of "rights consciousness" exhibited by the Court throughout this case. The due process right to be treated fairly and be given an opportunity to properly argue against government action is fundamental to the rule of law. *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Goss v. Lopez*, 419 U.S. U.S. 565, (1975). In *Grannis v. Ordean*, 234 U.S. 385, (1914), the Court held, "The fundamental requisite of due process of law is the opportunity to be heard." The central aim of due process is to assure fair procedure when the government imposes a burden on an individual. The burden on Petitioner through respondents' motion was the return of all "hard fought" confidential discovery documents in this case to respondents prior to the Supreme Court's ruling on Petition For A Writ Of Certiorari currently before it. As with its ruling denying Petitioner's post-trial affidavit, the District Court again denied the fundamental right to be heard.

2. The respondents' motion cites the Appellate Court denial of Stay of Mandate and Petitioner's Certification of Constitutional Questions as modality for their argument that "all matters were resolved."

3. The disallowed opposition argument asserts the Appellate Court's earlier judgments rendering moot certification procedure usurped discretion by denying Certification of Constitutional Questions to the Attorney General of the United States contrary to its statutory mandate pursuant to Fed. R. App. P. 44 and Title 28 U.S.C. 2403(a). *See* Pet. App. 5 & 6. For Constitutional Questions *See*: Petition Questions for Review, # 1, 2, 4 – 8.

Certification procedure is founded upon "the District Court's own doubt" about the jurisdictional meaning of Title 17 U.S.C. § 501, jurisdiction under "the Copyright Act":

> "While the Court agrees that section 501 (b) does provide that only the copyright holder has the right to bring a copyright infringement action, the Court is also aware that section 501 does not indicate when a Court will or will not have jurisdiction. Similarly, Section 501 does not indicate when a party who brings a copyright action, but is later found not to be the copyright holder after much discovery in a case, should be liable for costs. Therefore, it is clear that section 501 does not provide all the answers raised by Plaintiff Kessler's repeated attacks upon the costs taxed against him. ... Therefore, the Court must look elsewhere determining whether it had jurisdiction over Plaintiff Kessler." [From District Court Order, March 16, 1999.][1] *See*: Petition App.9, ¶ 3, 10, ¶ 4.

The Supreme Court holds the standing doctrine has an explicitly "prudential" dimension, developed to keep Article III courts from deciding questions more suitable for decisions by politically accountable decision makers.

In this case the prudential dimension of standing was set aside by the Court stating: "Therefore, the Court must look elsewhere determining whether it had jurisdiction over Plaintiff Kessler." See: Pet. App. 9 ¶ 4. This position was

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[1] The Honorable E. Richard Webber, Judge Presiding for the Eighth District Court.

upheld by the Appellate Court's final judgment; a position that endowed the Eighth Circuit Courts as super-legislators over an Act Of Congress, the Copyright Act; *See* Petition App. 1; an adjudication without merit as it is a clear usurpation of power by the courts.

Article I section 2 of the Constitution defines categories of federal jurisdiction in terms of cases and controversies. This led the Supreme Court to hold that federal courts may take jurisdiction only of "justicable" disputes, those "appropriate for judicial determination." *Aetna Life Insurance v. Haworth*, 300 U.S. 227 478 (1937). The Supreme Court continued to affirm under Article I Separation Of Powers that only Congress had power to confirm standing, not the courts. The Eighth Circuit Courts set aside this affirmation as irrelevant to its judgment.

The Eighth Circuit Courts use of *Carlson v. Hyundai* 164 F.3d 1160, 1163 (8th Cir. 1999) to uphold sua sponte in personam joinder of petitioner who was dismissed at trial, infracts the Fourth and Fifth Amendment, copyright stare decisis, and violates the political questions doctrine as the court assumed power to rewrite the statutory limitations of jurisdiction under copyright law imposed by Congress. The lower court's action upheld by the appellate court, violates Article III reference to cases and controversies standing doctrine and were perpetrated due to doubt about the meaning of Title 17 U.S.C. § 501.

In constitutional cases, the Supreme Court identified two aspects of the standing doctrine: "injury-in-fact" and a showing of actual governmental causation of that injury.

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). Said "injury" is undisputedly present in this case and upheld by the Appellate Court which allowed confusion of the meaning of the law to support its judgment; a doubt of law that denied rights under the First, Fourth and Fifth Amendments. Failure to certify the questions will lead to further due process irregularities for future litigants in a copyright case as these questions of constitutionality might escape judicial review if the action were dismissed or rendered moot as the Appellate Court has done in this case.

The questions for certification form a structural integration of standing, separation of powers, and Preferred Freedoms Doctrine which all stem from actions by the Eighth Circuit Courts. The Aschwander Rules and Footnote Four uphold this argument. *Aschwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)

By first denying stay of mandate, the Appellate court denied presentation of relevant facts and the compulsory process of the production of evidence that proved Constitutional Questions are clearly evident in this case. *See*: Petition, App. 5 and 6.

There is no expressed constitutional power in federal courts to implement judgments that rewrite jurisdictional stipulations established by an Act of Congress. If the court expresses doubt about the meaning of the law, then the Court of Appeals is empowered, indeed obligated, to overrule itself when it is persuaded that a particular precedent wrongly construes the Constitution. In this case

the persuasive argument is the District Court's rulings citing doubt about the law; doubt upheld at the Appellate level.

In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the Court ruled on the constitutionality of legislation not because it had a general commission to oversee Congress's legislative behavior, but because the Constitution is law.

However, in this instant case, the Appellate Court exercised prior restraint contrary to the First Amendment by first denying stay, and then rendered certification as moot. *Near v. Minnesota*, 283 U.S. 697 (1931). Its actions equates to denial of free speech protected under the First Amendment

The Court's prior judgment improperly denying certification of constitutional questions was the modality of respondents' argument in the Motion To Enforce Court Order, which asserts, "the Appellate Court resolved all matters in this case." Respondents' argument is unsupported by law.

4. The Appellate Court's failure to uphold its mandate pursuant to Title 28 U.S.C. § 2403(a) and Fed. R. App. P. 44 to certify the constitutional questions allows a live controversy to exist in this case. Simply stated, if every Court upheld doubt about the meaning of the law as modality for its judgments, then its judgments and the law itself would have no meaning whatsoever. That violates constitutional law.

CONCLUSION

The Supreme Court could exercise its power of judicial review and certify the Constitutional Questions to the Attorney General. *See* Petition Questions For Review, # 1, 2, 4 – 8.

Or the Supreme Court, prior to ruling on the Petition For A Writ Of Certiorari #00-877, could allow proper opposition argument to be made in the appeal currently pending before the Eighth Circuit Court of Appeals from the District Court's order of November 13, 2000.

Due to a live controversy present in the current appeal, Certification of Constitutional Questions are no longer moot, facilitating the Appellate Court to uphold its mandate to certify Constitutional Questions to the Attorney General of the United States pursuant to Title 28 U.S.C. § 2403(a). Certification would contribute to arguments made in the Petition For A Writ Of Certiorari currently before the Supreme Court Of The United States and would enable exercise of the High Court's power of judicial review to conform the Act of Congress, Title 101 U.S.C. § 501 "The Copyright Act" to constitutional constraints; thereby protecting future litigants in a copyright action.

Respectfully Submitted,

STEPHEN BURNS KESSLER
Petitioner
639 West Rose Hill
Kirkwood, Missouri 63122
314-966-0214

Petitioner, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

In Re: KEPSFILMS, INC.: Petitioner

Petition For Review To Honorable Justices of The United States Supreme Court

To the Honorable Justices of the Supreme Court of the United States. Petitioner KEPSFilms, Inc.:

¶ 1. Stephen Burns Kessler is an officer of your Petitioner, KEPSFilms, Inc. (a Missouri Corporation in good standing). Missouri law does not allow a corporate officer to represent their corporation in legal proceedings Clark v. Austin, 101 S.W.2d at 982-83. Missouri law does allow an officer of a corporation to petition for review as it "does not arise to the level of active representation or the holding out of the corporate employee to the public as capable of performing legal acts." *See* Liberty Mutual Insurance Co. v. Iones, 344 Mo. 932, 130 S.W.2d 945 (banc 1939); Hulse v. Criger, 247 S.W.2d at 862.

¶ 2. On December 20, 2000, a "Supplement to Petition For Writ Of Certiorari" was filed before the Supreme Court, by petitioner Stephen Burns Kessler in the above referenced case number under his name as sole petitioner without title reference to your petitioner, KEPSFilms, Inc.

THEREFORE, Petitioner KEPSFilms, Inc. petitions the Supreme Court to review Stephen Burns Kessler's pleadings and arguments in a light favorable to Petitioners legal standing as a rightful petitioner in the above action.

Respectfully Submitted,
Stephen Burns Kessler,
Officer for Plaintiff, KEPSFilms, Inc.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
CASE NO. 4:96CV01125 ERW

FILED: NOVEMBER 9, 2000.
RULED DOCUMENT: GRANTED, NOVEMBER 13, 2000
/S/ E. RICHARD WEBBER

STEPHEN B. KESSLER,
Plaintiff - Appellant

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Defendant-Appellees

MOTION TO ENFORCE COURT ORDER

Comes now Defendants, and move this Court to make and enter its order requiring Plaintiff to return all confidential materials produced by Defendants during the course of this litigation to counsel for Plaintiff, and in support thereof state:

1. On June 17, 1997, this Court entered a protective order in this case, which required that at the conclusion of this litigation, materials produced by one side to the other marked "Confidential" be returned to the producing party.

2. This case was tried to conclusion in January 1998. Thereafter, Plaintiff appealed the judgment to the United States Court Of Appeals for the Eighth Circuit, which appeal was unsuccessful.

3. At the conclusion of the first appeal, counsel for the Defendants sought return of confidential materials.

4. Attorney Martin Green, formerly counsel to Plaintiff, was completely cooperative in this efforts but was instructed by Plaintiff to withhold the documents until further appeals were exhausted, and so advised counsel for Defendants.

5. Recently, a second appeal to the Eighth Circuit Court of Appeals was denied, and on August 4, 2000, Plaintiff's petition for Rehearing *En Banc* was denied.

6. After the denial of the second appeal, the undersigned again wrote to Mr. Green, requesting the return of confidential documents. Mr. Green responded immediately by seeking the return of confidential documents from Mr. Kessler and Mr. Kessler's counsel, Mark G. Schulte. Unfortunately Mr. Kessler again instructed Mr. Green to refrain from forwarding the required documents.

7. On August 30, 2000 the Court of Appeals for the Eighth Circuit resolved all of the matters raised by Mr. Kessler's letter, by issuing an order stating that the mandate had in fact been issued, and denying Mr. Kessler's motion for certification of constitutional questions.

8. After the action of the Court of Appeals, Mr. Green and the firm of Green, Schaaf and Jacobson were completely cooperative, and along with Mr. Schulte returned some of the confidential materials to counsel for defendants, and certified that they had retained none. However, other confidential materials are in the hands of the Plaintiff

himself, and Plaintiff has refused to acknowledge his duty to return them.

WHEREFORE, Defendants pray this Court make and enter its order requiring that Plaintiff, and all his agents and associates, turn over all materials made available to them during the preparation and trial of this matter, and for its reasonable costs and fees expended herein.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

/s/ Stephen Rovak

By: Stephen H. Rovak, #4218
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314-241-1800
314-259-5959 (Facsimile)

Attorneys for Defendants Michael Crichton, Anne-Marie Martin, Ambin Entertainment, Inc. Steven Spielberg, Warner Bros., Universal City Studios, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Stephen Burns Kessler, 639 West Rose Hill, Kirkwood, Missouri 63122, by U.S. Mail, postage prepaid, on this 8th day of November, 2000.

/s/Stephen Rovak